TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 360.

NATHANIEL W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, AND CHANNING M. BOLTON, PLAINTIFFS IN ERROR,

vs.

ELIZABETH S. SCOTT, FRED W. SCOTT, E. T. D. MYERS, JR., AND THE CITY OF RICHMOND.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED OCTOBER 14, 1913.

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

N. W. Bowe et als.
v.
Elizabeth Scott et als.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioners, N. W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, respectfully represent that they are aggrieved by a final decree of the Chancery Court of the City of Richmond pronounced on the 6th day of March, 1911, in the cause depending in the said court, wherein petitioners were the complainants and Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and The City of Richmond, a municipal corporation, were the defendants. A transcript of the record of the case is herewith exhibited.

It will appear from the record in this case that on the 12th day of August, 1910, petitioners presented their bill of complaint verified by the affidavit, of Mr. N. W. Bowe before the Chancery Court of the City of Richmond, in vacation, praying for an injunction enjoining and restraining the defendants, Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and the City of Richmond, their

2 servants and employees from closing any portion of the public alley running between Shafter Street and Harrison street, south of Franklin street and parallel thereto, in the city of Richmond, in the bill mentioned, so as to obstruct the free passage of complainants and the public through the said alley, and, on the same day, an injunction was awarded in accordance with the prayer of the bill. Record page 24.

On the 21st day of December, 1910, the defendants filed their separate demurrers to the bill with the grounds therefor; and at the same time, the defendants, Elizabeth S. Scott and E. T. D. Myers, Jr., moved the Court to abate the suit as to the city of Richmond and Fred W. Scott. The several matters raised by the demurrers were argued before the court on the 21st and 22nd days of December, 1910. On the 17th day of February, 1911, the Court handed down its opinion in writing sustaining the demurrers. On the 24th day of February, 1911, the complainants tendered to the court their amended bill, and moved for leave to file the same, and the court took time to consider the matter. On the 6th day of March, 1911, the Court pronounced its final decree. The several demurrers to the bill were sustained upon the grounds stated in the opinion of the court. The motion of the complainant's to file their amended bill was rejected, and leave to file the amended bill was refused. The original bill was dismissed with costs; the injunction dissolved; and this cause was ordered to be dismissed from the docket. On the motion of the complainants, the said decree of March 6th, 1911, was suspended for a period of 60 days, in order to allow complainants time to present their petition to this honorable court for an appeal.

Assignment of Errors.

(1) The court erred in sustaining the several demurrers to the bill, and dismissing it as to each defendant with costs.

(2) The court erred in refusing leave to the complainants to amend their bill, and in rejection the complainants bill as amended.

(3) The court erred in dissolving the injunction awarded on the 12th day of August, 1910.

3 *The Facts in This Case.*

Petitioners believe your honors will be impressed with the importance of this controversy. The questions involved in litigation of this nature are necessarily of much moment. Your honors are asked to determine petitioners' rights in and to one of the public alleys or highways in the City of Richmond. The rights of the public in the street or alley are incidentally involved, hence the decision of this court will be watched with much interest.

In the year 1852, the boundaries of the City of Richmond did not extend as far west as Shafer street. The ground where the alley in controversy is located was in Henrico county. On the 31st day of March, 1852, Caroline N. Pollard for a valuable consideration conveyed to John C. Shafer that certain tract or parcel of ground lying and being in the county of Henrico, in Buchanan's old field near the western limits of the city of Richmond, containing four acres. The property conveyed to Mr. Shafer is the same real estate that now lies west of Shafer street, between Franklin street and Park avenue, in said city, and running west between the said streets for a distance of 362 feet. The said John C. Shafer owned the real estate when the boundaries of the city of Richmond were extended in the year 1867, and the property taken within the corporation limits.

Sometime between the years 1867 and 1875, Mr. Shafer divided his land by opening a public alley sixteen feet wide between the northern and southern portions of his land, so that in the year 1875 the said alley dividing the property of the said John C. Shafer and running from Shafer street to Harrison street was only 16 feet wide. On the 31st day of May, 1887, Mr. Shafer dedicated to the public four more feet of his said land and opened to the public an alley twenty feet wide, so that from the 31st day of May, 1887, up to the present time the public alley extending from Shafer street to Harrison street has been a public alley and highway twenty feet wide, and opened and used by the public and your petitioners continuously and uninterruptedly for a period of more than twenty years. On the 31st day of May, 1887, Mr. Shafer conveyed to Lewis Ginter a portion of the said real estate, and filed with his deed to the said Lewis Ginter a map or plot showing the property and the public alley twenty feet wide extending from Shafer to Harrison
4 streets and parallel to Franklin street. The acts and deeds of the said John C. Shafer in opening the said alley to the public constituted a dedication to the public of the twenty feet of

ground which were laid off and accepted as and for a public alley and highway by the City of Richmond. See Exhibit No. 2, filed with the bill.

Petitioners are citizens of the State of Virginia. N. W. Bowe owns the real estate on the south side of West Franklin street, in the City of Richmond, known as No. 917; Ann Clay Crenshaw owns the real estate on the south side of West Franklin street, in said city, known as No. 919; Ellie W. Putney owns the real estate on the south side of West Franklin street, in said city, known as No. 921; and Channing M. Bolton owns the real estate on the east side of Harrison street, in said city, known as No. 327 North Harrison street. The real estate owned by petitioners, N. W. Bowe, Ann Clay Crenshaw, and Ellie W. Putney fronts on the south side of West Franklin street between Shafer and Harrison streets, in said city, ninety-nine feet and four inches, and runs back southwardly between parallel lines a distance of 150 feet to and abuts on the said public alley which is twenty feet wide. The real estate No. 327 North Harrison street, in said city, owned by Channing M. Bolton fronts on the east line of Harrison street and runs back along the said alley a distance of 150 feet. At this point, if your honors will refer to the blue print made by T. C. Redd & Bro., on the 10th day of March, 1910, and filed with petitioners' bill of complaint as Exhibit No. 1, you will get a clear understanding of the location of the real estate owned by petitioners on Franklin street and Harrison street, and the public alley twenty feet wide between Shafer and Harrison street.

The said alley was a public alley at the time petitioners purchased their property, and they bought with reference to it. About twenty years ago, petitioners and other property owners abutting upon the said alley paved it with granite blocks from Shafer to Harrison streets at their own costs and expense, and for more than twenty years the alley has been used by your petitioners and the public as and for a public way. The said alley is a continuation of a public highway running west from Laurel street, in said city, out to Lombardy street. Under an ordinance of the City of Richmond, it is unlawful for any person to drive vehicles carrying or designed to carry loads of greater weight than 1,000 pounds along Franklin street and Park avenue and the said public alley has been used by the public for travel for such wagons and vehicles as are prohibited from traveling on Franklin street and Park avenue.

On the 2nd day of May, 1910, Elizabeth S. Scott and E. T. D. Myers, Jr., presented to the Council of the City of Richmond a petition asking that the said alley and highway for a distance of 130 feet and 11 inches, or so much of twenty foot alley running from Shafer to Harrison streets as lies between the front and rear lots owned by Mrs. Scott and Mr. Myers, be closed. Here if your honors will again refer to the blue print in the record you will see that portion of the said alley Mrs. Scott and Mr. Myers petitioned the council to close. A copy of the petition of the said Elizabeth S. Scott and E. T. D. Myers, Jr., to the Council of the City of Richmond, is filed with your petitioners' bill of complaint and may be seen on page 19 of the record.

On the 2nd day of May, 1910, the said petition was referred by the council of the Committee on Streets—one of the committees of the Council of the City of Richmond—and on the 5th day of July, 1910, the said committee returned to the said Council of Richmond the petition together with an ordinance which it recommended for adoption. The report of the committee on streets will be seen on page 21 of the record.

The ordinance recommended was in the following words:

"*An Ordinance.*

To Close the Portion of an Alley Extending from Shafer Street to Harrison Streets, Located Between Franklin Street and Park Avenue.

Be it ordained by the Council of the City of Richmond:

1. That upon the petition of Elizabeth S. Scott and E. T. D. Myers, Jr., the portion of the alley now extending from Shafer street to Harrison street located between Franklin street and Park avenue commencing at a point one hundred and eighty-five feet six inches from the west line of Shafer street for one hundred and ninety-three feet seven and one half inches, of which one hundred and fifty-eight feet seven and one half inches, a part thereof, lying between the lot of the said Elizabeth S. Scott on the south
6 and her lot on the north, and thirty-five feet, the residue thereof, lying between the lot of the said E. T. D. Myers, Jr., on the south and his lot on the north, be, and the same is hereby, closed to the public use and travel, provided, however, that the said abutting property owners, their heirs and assigns shall not erect, construct or maintain any dwelling, stable, shed or house of any kind on the portion of the alley so closed.

2. That the rights hereby granted shall expire by limitation thirty years from the passage of this ordinance, and the said City of Richmond hereby expressly reserves the right to amend or repeal this ordinance, and to require, at its pleasure, the reopening and establishment as a public alley of the portion of said alley hereby closed, without compensation to said abutting land owners, their heirs or assigns; and at the expiration of the rights hereby granted or in the event said alley is re-opened and re-established, abutting land owners, their heirs or assigns shall have paved said portion of said alley and put the same in proper condition and repair satisfactory to the City Engineer.

3. That the said Elizabeth S. Scott and E. T. D. Myers, Jr., their heirs, executors, administrators, assigns and subsequent owners of the said abutting property shall indemnify and save harmless the City of Richmond from all damages of whatever nature, arising or claimed by any person to person or property, growing directly or indirectly out of the closing of the said alley, and shall defend at their own costs and charges any suit or suits brought by any person to recover damages growing out of such closing and to that end the said Elizabeth S. Scott and E. T. D. Myers, Jr., shall execute unto the said City of Richmond a bond in the penalty of Ten Thousand

Dollars ($10,000) with surety satisfactory to the City Attorney, conditional that they, their heirs and assigns, will at all times indemnify and save harmless the said City of Richmond against any and all such damages to person or property which may be occasioned by the closing of said alley, as well as all costs and charges growing out of the defence of any suit or suits brought on account of such closing.

4. Any person violating any of the provisions of this ordinance shall be liable to a fine of not less than twenty-five nor more than one hundred dollars, recoverable before the Police Justice of
7 the City of Richmond, each day's continuance of such violation to be a separate offence.

5. This ordinance shall be in force from its passage."

The said ordinance was adopted by the Common Council on July 5, 1910, and concurred in by the Board of Aldermen on July 12, 1910, and presented to the Mayor on the 15th day of July, 1910. The Mayor did not approve the ordinance, but vetoed the same upon the ground that it was contrary to public policy. A copy of the veto of the mayor was filed with the bill of complaint marked Exhibit No. 5. See page 22 of the record.

On the 1st day of August, 1910, the Common Council of the City of Richmond passed the said ordinance over the veto of the Mayor, and the Board of Aldermen concurred on the 9th day of August, 1910.

Petitioners, in the 9th paragraph of their bill of complaint, make the following charge:

"Complainants charge and aver that the act of the Common Council of Richmond, in passing the said ordinance over the veto of the Mayor of the City is an unwarranted attempt on the part of the Common Council of the City of Richmond to give the exclusive use of the public property—mentioned in the ordinance—to Elizabeth S. Scott and E. T. D. Myers, Jr., for a period of thirty years, without consideration to the city and prejudicial to the rights of complainants and harmful to the public at large. That while the said ordinance does not say what rights are granted to the said Elizabeth S. Scott and E. T. D. Myers, Jr., in and to the said public alley, it is understood and believed by your complainants, and they so charge and aver, that the said Elizabeth S. Scott and E. T. D. Myers, Jr., will close the said alley at the points mentioned in the said ordinance and turn the enclosed portion of the said public alley into a yard for their own private and exclusive use and enjoyment and to the exclusion of your complainants and the public, so that your complainants and the public will not be able to use the said alley and pass and repass over and along it which they have been doing without interruption and as a matter of right for more than twenty years.

8 Petitioners in the 10th paragraph of their complaint, aver "that the said ordinance is invalid and void for the following reasons:

(*a*) That the Common Council of the City of Richmond had no authority to pass the said ordinance;

(*b*) That the act of the Common Council of the City of Richmond in attempting to pass the said ordinance was ultra vires;

(*c*) That the ordinance is an attempt to take from your complainants, whose property adjoins and abuts upon the said alley, their rights in and to the said alley without due process of law;

(*d*) That the ordinance materially impairs the access of complainants to their premises, and attempts to give Elizabeth S. Scott and E. T. D. Myers, Jr., public property for their private use and enjoyment and authorizes a public nuisance;

(*e*) That the said ordinance is contrary to public policy; that it gives a private use to public property, and was passed in violation of section 1033*f* of the Code of Virginia, 1904;

(*f*) That the title to the ordinance is not broad enough to indicate its purpose and to include paragraphs 2, 3, and 4, of the said ordinance;

(*g*) That the said ordinance is vague and indefinite and does not state what rights are granted to the said Elizabeth S. Scott and E. T. D. Myers, Jr., in and to the said alley."

Petitioners in the 11th paragraph of their bill of complaint, "charge and aver that their property abuts and adjoins the said public alley, and that it is the direct way leading from Shafer street to the rear of their premises and from their premises to Shafer street; that they have used the said alley or highway to pass and repass from the rear of their premises to said Shafer street continuously and uninterruptedly in common with the public for a period of more than twenty years; that the use of the said alley to
9 pass and repass from the rear of their premises is of much value to them as well as to the public, and that if the said alley is closed their rights in the said public way or alley will be impaired and their property damaged."

Petitioners in the 12th paragraph of their bill of complaint "charge and aver that that portion of the said alley ordered to be closed by the said ordinance and granted to the said Elizabeth S. Scott and E. T. D. Myers, Jr., for their private use and enjoyment to the exclusion of the use and enjoyment by petitioners and the public, was dedicated to the public by John C. Shafer who owned the fee as and for a public alley, and the Common Council of the City of Richmond had no authority to devote the property or any portion of it, or authorize any one else to devote it, to a use which is inconsistent with the use to which it was dedicated by the said John C. Shafer."

In the 13th paragraph of their bill, petitioners "charge and aver that the said ordinance is null and void because it is in conflict with section 10, Article 1, of the Constitution of the United States; that it impairs the obligation of the contract between the said John C. Shafer who dedicated the land as and for a public alley, and the City of Richmond."

Your petitioners, in the 14th paragraph of their bill, make the following charge: "Complainants charge and aver that the said

alley or way is of a particular benefit and advantage to them and to each of them; that their property adjoins and abuts upon the said alley; that it is the direct way from and to the rear of their property for provisions, coal, and such other things as are brought in from the rear of their premises; that their right of egress and ingress from the rear of their property will be irreparably impaired if the said public alley is closed and they are denied the right of passage through the said public way."

In the 15th paragraph of the bill, petitioners state that the said Elizabeth S. Scott and E. T. D. Myers, Jr., will act under the said void ordinance and will close the said alley so that petitioners and the public will not be able to pass and repass through the said alley,

> unless an injunction is immediately awarded enjoining and restraining them from closing the said alley to your petitioners and the public."

The prayer is that the said ordinance of the City of Richmond be declared null and void, and that an injunction be awarded enjoining the closing of the alley, so as to obstruct the free passage of petitioners and the public through the said alley, and for general relief.

The foregoing appears to be a fair statement of the facts in this case, in connection with which we have stated certain charges contained in the bill. See the bill of complaint and the exhibits filed therewith in the record.

The contention of the petitioners in this case may be briefly stated as follows: They contend (1) that the ordinance of the City of Richmond is void; (2) that Elizabeth S. Scott and E. T. D. Myers, Jr., have no right under the said ordinance to close the alley—mentioned in the ordinance—and turn the enclosed portion into a yard for their own exclusive use and enjoyment; (3) that if the said alley is thus enclosed, petitioners will be denied the use of the alley, their property will thereby be damaged, they will suffer personal inconvenience and annoyance, and will suffer an irreparable injury; (4) that unless an injunction is awarded the said alley will be enclosed by Mrs. Scott and Mr. Myers under the said ordinance, and the injury to petitioners will be irreparable.

Your honors will observe that the first question that arises in this controversy is, whether the Council of the City of Richmond had the power and authority to pass the ordinance under consideration. If a city can, without any consideration, give its streets and public alleys to private individuals for their private and exclusive use and enjoyment to the annoyance, inconvenience and damage to other citizens whose property abut on the streets or alley given away, then in that case, petitioners will concede that they have no case, and must continue to suffer great inconvenience and annoyance and submit to their property being damaged without a remedy for the wrongs thus inflicted upon them. But petitioners do not concede the power in the Council of Richmond to pass such an ordinance, and they contend that the ordinance is void.

The Ordinance is Void.

By-laws like this one have been before this court before,
11 and in every instance, we believe, this court has pronounced them void. Irrespective of the decisions of this court, we think the ordinance comes within the prohibition of the Constitution of Virginia. It is certain that the Council of the City of Richmond can have no greater power to enact a law than the General Assembly of Virginia, therefore, the Council of the City of Richmond cannot pass an ordinance conferring special and exclusive rights and privileges in public highways, which are under the supreme control of the legislature, when such a right is denied the law making power of the State.

Article 1, section 4, of the Constitution of Virginia, provides, "That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." Article 11, section 63, clause 18, provides that the "General Assembly shall not enact any local, special, or private law in the following cases; clause 18, "Granting to any private corporation, association, or individual any special or exclusive right, privilege or immunity."

The word "privilege" is defined to mean, a peculiar benefit, favor, or advantage; a right or immunity enjoyed only by certain persons or under special conditions.

Now, the ordinance confers upon Mrs. Scott and Mr. Myers the exclusive right and privilege to use the alley in question for a period of thirty years, and under the ordinance, they have a peculiar benefit, favor and advantage and an immunity enjoyed only by them. That they will enjoy such a right is not denied, and that the privilege was granted without consideration of public service is admitted.

Article 1, section 23 of the Constitution of Alabama, provides, that no law shall be passed by the general assembly "making any irrevocable grants of special privileges or immunities." This provision of the constitution came before the supreme court of Alabama for construction in the case of Birmingham and Pratt Mines Street Ry. Co. v. Birmingham Street Ry. Co., 79 Ala. p. 466. The bill in this case was filed by the Birmingham Street Railway Company, a private corporation, against the Birmingham and Pratt Mines Street Railway Company, also a private corporation, and the
12 several persons composing it; and sought to enjoin and restrain the defendants from attempting to operate or construct a street railway on Eighteenth street and avenue B south, in the City of Birmingham, or otherwise interferring with the complainant's alleged exclusive right to a railway along or through said street under its contract with the City of Birmingham.

It was contended that the contract in question, so far as it purported to grant to the appellee the exclusive right to railway privileges over the streets designated, was void for two reasons. First, on the ground that there was no clause in the charter of the city, nor any other law of the General Assembly, which authorizes the making of such

a contract; and, secondly, because the contract itself is in violation of section 23 of Article 1, of the Constitution of Alabama, which provides, that no law shall be passed by the General Assembly "making any irrevocable grants of special privileges or immunities."

The Court said: "Neither the charter of the City of Birmingham, nor the general statutes, confer on that corporation the power to grant, by ordinance in the nature of a contract, the exclusive franchise in perpetuity of running a street railway through certain designated streets and avenues of the city; and if such power were granted by its charter, or by any public statute, it would be violative of the constitutional provision (Art. 1, section 23) against the passage of any law "making any irrevocable grant of special privileges or immunities." * * * "The General Assembly would itself have no power under the constitution to make such a grant. A fortiori a mere municipality would have no such power."

It will be observed that the language of the Constitution of Virginia is broader than that in the organic law of Alabama. The Virginia Legislature shall not pass a law "granting to any private corporation, association, or individual any special or exclusive right, privilege or immunity."

Again, irrespective of the constitutional prohibition, the ordinance is void because the Council of Richmond had no power to pass it.

In Lynchburg etc., Ry. Co. v. Dameron, 95 Va. p. 548, this Court said: "It is settled law in this state that a municipal corporation possesses and can exercise the following powers and none others:

First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable." See also Winchester v. Redmond, 93 Va. p. 711; 1 Dillon's Municipal Corporations, sec. 89; Gas Co. v. Parkersburg, 30 W. Va. p. 435; Hogg's Equity Principles, p. 367.

Tested by this settled principle of law, the ordinance in this case cannot stand. No express power has been granted to the city of Richmond to pass such a by-law. Richmond v. Smith, 101 Va. p. 161. It is certainly not a necessary or implied power to those granted, and it is equally certain that it is not essential to the objects of the corporation to give away its public streets and alleys for the exclusive private use and enjoyment of individuals.

In Gas Co. v. Parkersburg, 30 W. Va. p. 435, the City of Parkersburg passed December 2, 1864, giving the Gas Company "the exclusive privilege of using the streets, alleys, and public grounds of said city for the purpose of laying down pipes for the conveyance of gas in and through said city, for the use of said city and its inhabitants, for the term of thirty years." By an ordinance passed December 9, 1886, the said city authorized the Parkersburg Electric Light and Power Co. to construct an electric plant in said city for the purpose of furnishing electric light and power to the said city and its inhabitants, which shall be the best obtainable for the purpose of lighting stores and dwellings, as well as the streets of said city; and to erect poles, posts and towers in the streets and alleys.

The Gas Company brought suit to prevent the Electric Light Co. from putting up poles and wires in the streets and alleys on the ground that it would be an infringement of its exclusive privilege. The Court said: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; secondly, those necessarily and fairly implied in or incident to the powers expressly granted; thirdly, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract,
14 or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations." "We will now apply these principles to the case at bar. It is not pretended that either the charter or any statute, in express words, ever granted to the City of Parkersburg the power to confer upon any corporation or individual the exclusive privilege of using the streets, etc. of said city for the purpose of laying down gas-pipes to light the city with gas; nor do we think such power can be necessarily or fairly implied, or held incident to the powers expressly granted. The exercise of such power may be convenient, but that is not sufficient; it must be essential and indispensable to the powers expressly granted, or to the declared objects and purposes of the corporation." * * * "My conclusion therefore is that the city acted beyond the scope of its powers in passing the ordinance of December 2, 1864, if, as claimed by the gas company, in its bill, it thereby attempted to irrevocably confer upon the gas company the exclusive right for 30 years to light the city, and use its streets for that purpose; and that its act was ultra vires, and void, to the extent that it attempts to confer such exclusive right."

We said above that ordinances similar to the one here have been before this court, and in every case they were held invalid.

In the case of Norfolk City v. Chamberlaine, 29 Grat. 534, Chamberlaine owned a lot and building in the city of Norfolk on Main Street. In the early part of 1867, the building was destroyed by fire. Chamberlaine proceeded to rebuild upon the same lot, and before he put up the front wall of said building he made application to the common and select councils of the city of Norfolk "that he be allowed to have open iron steps to a new building then being erected on Main Street next to the First National Bank, to extend no further out than the buttresses of the steps of said bank; that space to be occupied being the same used for a broad step and descent to the building destroyed by fire." Upon this petition, the Common Council adopted the following resolution:

15 "Resolved, That the steps of the building of R. H. Chamberlaine, now being erected on Main Street near Bank, be permitted, provided they do not occupy any more of the pavement than the steps of the building recently destroyed."

Chamberlaine, having obtained this permission, completed his building, and extended the steps out upon the sidewalk or pavement, the distance of four feet four inches, and between these steps thus projecting from each end of the building, there was dug out an excavation, and steps were constructed leading to a basement under the house. In February, 1876, a petition was presented to the select and common councils of the city of Norfolk requesting the steps to be removed. In accordance with this petition, the councils directed the steps to be removed. The Citizens Bank applied for an injunction enjoining the inspector of streets from carrying out the orders of the council to remove the steps of the Citizens Bank as an obstruction to the street. The injunction was awarded the bank, which the court refused to dissolve, and afterwards a decree was entered perpetuating the injunction. On these facts, Judge Christian, speaking for the court said: "I am of opinion that this decree of the corporation court of the city of Norfolk perpetuating the injunction is plainly erroneous."

"It is well settled that a street in a city or town is a public highway. The word highway is considered as the genus of all public ways, so that a common street in any city or town being common to all people is a public highway.

"Public streets, unless there be some special restriction when dedicated or acquired, are for the public use, and the use is none the less for the public at large as distinguished from the municipality, because they are situate within the limits of the latter. In other words, public streets are not the property of the municipality or of the people of the municipality, but of the public at large. The Legislature of the State alone represents the public at large, and it alone has full and paramount authority over all public highways. As was well said by Chief Justice Gibson, in O'Connor v. Pittsburg, 18 Pa. St. R. 187: To the commonwealth here, as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets, regulated and repaired by the authority of a municipal corporation, are as much highways as rivers, rail-

16 roads, canals or public roads laid out by authority of the State.

"Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is in either case of the essence of the street that it is public, and hence under the paramount control of the legislature as the representative of the public. Streets do not belong to the city or town within which they are situated, although acquired by the exercise of the right of eminent domain, and the damages paid out of the corporation treasury. The authority of municipalities over streets, they derive, as they derive all their powers, from the legislature. The fundamental idea of a street is not only that it is public, but public for all purposes of free and unobstructed passage, which is its chief and primary use.

"Upon these established principles, I am of opinion that the select and common councils of the city of Norfolk had no authority to pass the resolution of the 27th of May, 1867, granting permission to the appellee, Chamberlaine, to occupy, by the steps of his building, any portion of a public street in the City of Norfolk. There is nothing in the charter of the city, or in any act of the legislature, authorizing the use of a public street for private convenience or profit."

This question came before this court again in the case of Richmond v. Smith, 101 Va. p. 161. In this case the Court held void an ordinance of the City of Richmond granting the Richmond Carnival Association permission to erect, and maintain, in and along the streets named, booths or other structures, and, with the consent of the Committee on Streets, to suspend the use of the roadbed of the streets used, or certain parts thereof, as a highway for horses or vehicles during the period prescribed, and for three week days prior thereto, and for three week days thereafter. Judge Harrison, speaking for the Court, said: "The city had no power or authority, in the absence of a grant from the General Assembly, to confer upon the Carnival Association the right to erect this structure in the public street. No such authority is found in its charter, or the general law. On the contrary, the charter only gives the city authority to remove structures, obstructions, and impediments from the streets, and to prevent them from being encumbered or obstructed. The power and authority of the city is contained in its charter, and bound*ed* thereby. It has no other or different control of the streets than is prescribed in the charter or general statutes of the State. Having no
17 legislative authority to grant the use of the streets for such purpose, the ordinance was a nullity." And continuing, the learned Judge at page 167 says: "Public highways belong, from side to side and end to end, to the publ'c, and any permanent structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance per se, and may be abated, notwithstanding space is left for the passage of the public. This is the only safe rule, for, if one person can permanently use a highway for his own private purposes, so may all, and if it were left to the jury to determine in every case how far such an obstruction might encroach upon the way without being a nuisance there would be no certainty in the law, and what was at first a matter of small consequence would soon become a burden not only to adjoining owners, but to all the tax payers and the traveling public as well. Thus, expediency forbids any other rule. But even if it did not, the rule is well founded in principle, for it is well settled that the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler, and if this be true it necessarily follows that there can be no rightful permanent use of the way for private purposes."

In Chambers v. Roanoke Industrial and Agricultural Assn. et al., reported in Virginia Appeals, vol. 4, p. 340, an ordinance of the City of Roanoke permitting the association to fence Pleasant Avenue for fair purposes was held void. Judge Harrison, in delivering the opinion of the court said: "We are of opinion that the court erred in

its decree of August 6, 1906, dissolving the injunction theretofore granted restraining the appellee association from obstructing Pleasant Avenue in the manner alleged in the bill.

"The record shows that Pleasant Avenue is a public highway, and this being so the city of Roanoke had no power or authority, in the absence of a grant from the General Assembly, to confer upon the appellee association the right to fence up any part of such highway and to erect the buildings complained of thereon. No such authority is found in its charter or the general law.

"It is well settled that public highways, whether they be in the country or in a city, belong, not partially, but entirely, to the public at large, and that the supreme control over them is in the Legislature. It is also an established general rule that any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law.

"The City of Roanoke having no legislative authority to grant the use of Pleasant Avenue for the purposes here complained of, its ordinance was a nullity, and furnishes no warrant for the act of the appellee association in fencing up one-half of this public highway and building sheds, stables, and other buildings thereon for fairground purposes."

There can be no doubt that the above cases put at rest the question that there can be no permanent private occupation of a public highway for private purposes, and that a city ordinance conferring upon private individuals the right to fence and close public streets and alleys for private use is void. Yet in the face of this well settled principle of law, the Council of the City of Richmond has passed an ordinance attempting to give to Mrs. Scott and Mr. Myers the exclusive right to use and enjoy the public alley, in the rear of their premises, for a period of thirty years. Surely the ordinance cannot stand. If one citizen can occupy the highways for his private use and enjoyment, so may all, hence a rule that would admit private occupation of public streets and alleys would lead to the destruction of all public ways.

Not only is it settled law in Virginia that a private individual cannot appropriate the public alleys and streets for private use, but this principle of the common law is recognized in all of the States without dissent, so far as we know.

In Pettis v. Johnston, et al., 66 Ind. p. 139, the Supreme Court of Indiana said: "A city has no power to authorize the construction of anything, which, when constructed, will be a public nuisance.

"A city has no power to authorize a property owner to construct anything which, when constructed, will permanently interfere with the enjoyment of the rights either of the public or of a private person."

In Mayor &c. of New Orleans v. United States, 10 Peters, p. 599, the Supreme Court, in an unanimous opinion, said: "That public places, such as roads and streets, cannot be appropriated to private uses, is one of those principles of public law which requires not the support of much argument. Nor is there any doubt that if, by a

stretch of arbitrary power, the preceding government had given away such places to individuals, such grants might be declared void."

19 In the case of the State, Montgomery et al. Pros. v. The Inhabitants of the City of Trenton, 36 N. J. L. Rep. p. 79, the Court, in holding an ordinance, granting individuals the use of the street for private use, void, said: "Streets and highways are intended for the common and equal use of all citizens, to which end they must be regulated. An appropriation of them to private individual uses, from which the public derive no convenience, benefit or accommodation, is not a regulation, but a perversion of them from their lawful purposes, and cannot be regarded as an execution of the trust imposed in the city authorities." To the same effect, see also, Elliott on Roads and Streets, section 659; Dillon's Municipal Corporations, section 660 and note; Milhau v. Sharp, 27 N. Y. p. 611; Mikesell v. Durkee and Stout, 34 Kan. p. 509; Mayor of Macon et als. v. Harris, 75 Ga. p. 761; Field v. Barling, 149 Ill. p. 556; Sarah Van Witsen et als. v. Bertha Gutman, 79 Md. p. 405; Story v. N. Y. El. R. R. Co., 90 N. Y. 122; Lahr v. Metropolitan Ele. R. Co., 104 N. Y. 268; Ackeman v. True, 175 N. Y. p. 353; Maurice Ins. Co. v. St. Louis M. & S. Ry. Co., 41 Fed. Rep. p. 649; Cooley's Constitutional Lim. (7th Ed.) p. 270, 297 and note, and 309.

The ordinance is invalid because it is not reasonable. Judge Cooley, Cooley's Constitutional Limitations, page 280, says: "Municipal by-laws must be reasonable. Whenever they appear not — be so, the court must, as a matter of law, declare them void. To render them reasonable, they should tend in some degree to the accomplishment of the objects for which the corporation was created and its powers conferred." And at page 291, he says: "So a by-law of a town, which, under the pretense of regulating the fishery of clams and oysters within its limits, prohibits all persons except the inhabitants of the town from taking shell fish in a navigable river, is void as in contravention of common right. And for like reasons a by-law is void which abridges the rights and privileges conferred by the general laws of the State, unless express authority therefor can be pointed out in the corporate charter." See also cases cited in the note, and Fulton v. Norteman, 69 W. Va. p. 562; Kirkman, &c. v. Russell, Auditor, 76 Va. p. 956; Roper et als. v. McWhorter and als., 77 Va. p. 218; Dillon's Municipal Corporations, section 319.

The ordinance was passed in violation of section 1033 of the Code. This statute provides what shall be done before any franchise, privilege, lease, or right of any kind to use public property is

20 granted. We think the statute has reference to public service corporations that from necessity must make use of the streets and public places. But be this as it may, it is certain that no city can grant any privilege or right of any kind to use any public property in a manner not permitted to the general public without complying with the statute, and it is a misdemeanor to do so. Now, if the city can give away 184 feet of a public alley twenty feet wide, almost in the heart of the city, so that two citizens may use the same for their exclusive use, as a private yard, it can give away any other public

property to any person for private use, and the statute thus becomes of no effect and is a dead letter, so it appears to us. See Richmond v. Smith, 101 Va. p. 161; Veto of Mayor Richardson, Exhibit No. 5, filed with the bill, at page 22 of the record.

The ordinance is void because it confers special favors and privileges upon particular individuals, and discriminates against the complainants and other citizens. Such a law or by-law is not constitutional. Equality of rights, privileges and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government. Cooley's Constitutional Limitations, p. 562. "The State it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes still more so." Cooley's Constitutional Limitations, p. 563.

It would appear that the Council of Richmond had no great respect for the "fundamental maxim of government" when it passed this by-law complained of. Surely, the law making department of Richmond forgot when they voted on the ordinance that "Those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at the plough."

It will be remembered that the ordinance provides a penalty for its violation. The penalty is really for the protection of the parties sharing the special privileges, and while they are in fact exempt from the penalty imposed, the general public are made amenable to a fine for violation of its provisions. The ordinance was cleverly drawn, so that the penal clause applies to "any person, yet the practical operation is different. The parties who enjoy the special privilege are not affected while the rest of the community is made responsible for a violation of the provisions of the by-law.

21

In Lewis v. Webb, 3 Maine, 326, the court said: "On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality."

The ordinance is void because it is in conflict with section 10, Article 1, of the constitution of the United States; that it impairs the obligation of the contract between John C. Shafer, who dedicated the alley, and the City of Richmond who accepted it.

Petitioners contend that when John C. Shafer dedicated the land in question as and for a public alley, and the City of Richmond accepted it as such, a contract was made, and it is not within the power

of the council to use, or authorize any one else to use it in a manner inconsistent with the contract of dedication.

In Le Clercy v. Trustees of Gallipolis, 28 Am. Dec. p. 641, the court said: "The power of the legislaure over property dedicated to public use is not absolute. It may regulate the use of such property, or promote its improvement, but cannot divert or subject it to any use clearly inconsistent with the contract of dedication, and upon such diversion, any person interested would be authorized to institute proceedings to enjoin it."

In Dillon's Municipal Corporation, section 653, the law is stated as follows: "Property unconditionally dedicated to public use, or to a particular use, does not revert to the original owner except where the execution of the use becomes impossible. If the dedicated property be appropriated to an unauthorized use, equity will cause the trust to be observed or the obstruction removed." See also page 786.

22 If the land is dedicated as a public square, and accepted as such, a law devoting it to other uses is void, because violating the obligation of contracts." Cooley's Constitutional Limitation, page 344, citing Warren v. Lyons City, 22 Iowa, p. 351.

In Minor on Real Property, section 1355, the author says: "If land be dedicated for particular public uses, and the dedication is accepted, the authorities are bound to use it for such purposes, and their user of the land for other purposes may be restrained in equity upon the application of owners of other land injured by such user," * * * "But such improper use by the authorities does not terminate the right of the public to use the land in the manner prescribed by the dedicator." See also Elliott on Roads and Streets, section 419; Lahr v. Metropolitan Ele. Ry. Co., 104 N. Y. P. 291; Barclay et als. v. Howell's Lessee, 6 Peters, 481; New Orleans v. United States, 10 Peters 662; Cincinnati v. Lessee of White, 6 Peters, p. 453; Taylor et als. v. The Commonwealth, 29 Grat. p. 780; and Buntin v. Danville, 93 Va. p. 200.

The reason for the rule is plain. If a man gives his property for a particular purpose and it is accepted, and after acceptance, the authorities should make a different and inconsistent use of the dedicated property, it would amount to a fraud, and no person would be willing to depart with his land if that were the case. It is right and just, therefore, that a dedication should be regarded as a contract which is protected by the Federal Constitution, and it is plain that an ordinance which undertakes to impair the vested right of the public in the alley, and makes a use of it inconsistent with the use for which it was dedicated is void because it impairs the obligation of contracts.

Petitioners believe that the ordinance is invalid for other reasons stated in the bill, but as they have dwelt at some length upon the question of the validity of the by-law, they simply rely upon the other grounds stated in their bill without making any comment in this petition.

The Court Erred in Sustaining the Demurrers and Dismissing the Bill.

Highways have ben a prolific source of litigation. The reports abound with cases concerning rights in and to roads and streets.

It would seem that the decisions are not uniform on all points,
23 but it is agreed on all sides that the primary purpose of a public way is the right of free and unobstructed access. Norfolk v. Chamberlaine, 29 Grat. 538; Richmond v. Smith, 101 Va. 161.

The owner of land has a right to have access thereto, which is a toitally different right from the public right of passing and repassing along the highway. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right. Dillon's Municipal Corporation, page 886 and note.

In the well considered case of Lahr v. Metropolitan Elevated R. Co., 104 N. Y. p. 291, the Court said: "An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to, and through his property. These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimates by the public authorities in raising the fund necessary to defray the costs of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property."

In Adams v. Chicago, etc. R. R. Co., 39 Minn. p. 286, the court said: "We think that the doctrine is unqualifiedly established that, no matter how the abutting owner acquires title to his land, and no matter how the street was established, so that the only right of the public is to hold it for public use as a street forever, and no matter who may own the fee, and abutting owner necessarily enjoys, certain advantages, from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right to free access to his premises." The doctrine is unqualifiedly established says
24 the court, that abutting owners necessarily enjoy certain advantages in the street adjoining their property by reason of its location, and that depriving him of or interfering with his enjoyment of the easement for any use, not proper street use, is taking his property within the meaning of the constitution. See note to case of Field v. Barling, 41 Am. St. Rep. p. 323.

Apply this established doctrine to the charges made in the bill, and the conclusion will be reached, it seems to us, that the complainants, from the location of their property, will suffer an injury different in kind from any injury that the public will suffer, by the

destruction of the alley. This must necessarily be so. The complaintiffs' property is located on the alley. The location gives rights which are not enjoyed by the general public, and if these rights are destroyed, they are deprived of advantages not enjoyed by the general public, and hence must suffer an injury greater in degree and distinct and different in kind from an injury inflicted upon the public.

In Iron Works v. O. R. & N. Co., 26 Oregon, p. 228, the Court said: "Any structure in a street which is subservive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made. However difficult it is to trace its origin, or to refer it to any exact legal principle, it is undoubtedly the prevailing doctrine of American Jurisprudence that the owner of a lot abutting on a city street, the fee of which is in a municipality, has, by virtue of proximity, special and peculiar rights, facilities and franchises in the street, not common to the citizens at large, in the nature of easements therein, constituting property of which he cannot be deprived by the legislature or municipality, or both, without compensation."

Now, by this doctrine, the complainants, by virtue of proximity, have special and peculiar rights, facilities and franchises in the street, not common to citizens at large. The converse of the proposition must be true. Hence, if the alley is destroyed, the complainants, by reason of proximity, will be deprived of their "special and peculiar rights, facilitates and franchises in the alley, not common to the citizens at large," and will, therefore, suffer special and peculiar damages different in kind from injuries to the public at large, if the alley is closed in the manner stated in the bill.

The "American doctrine" that "proximity" creates a special
25 and peculiar right and advantage in streets is a common sense doctrine. It is true that the public is entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler. But because the public is entitled to a free passage along the street, it does not follow that a certain way or alley may not be of great value to particular citizens as affording a direct and convenient means of access to their property, while the same alley or way may be practically of no use or value to other citizens who may never have occasion to use it. The alley in the rear of one's premises, which he makes use of daily for ingress and egress means much to that person whose property abuts upon the alley, while the same alley, as a matter of fact, may be of no value or use to one living in a remote part of the town, and who may in a life time, never have occasion to travel over it. We think the law took this just view of the matter when it held that "Location gives rights which are not enjoyed by the general public."

Again, this principle is recognized in the statutes which allow the municipality to charge the property owners for paving done in the street abutting their property, on the ground that they obtain a peculiar advantage thereby.

We have shown above that the ordinance is void. If the by-law is invalid, then the obstruction of the alley in the manner complained

of will be unlawful and a nuisance, and will work a special and peculiar injury and damage to complainants by destroying their special and peculiar rights and advantages which they enjoy by reason of the location of their property.

It seems well settled that equity will, under these circumstances, take jurisdiction and award an injunction to prevent the unlawful obstruction and destruction of a public alley, so as to preserve the status of the parties and prevent an irreparable injury.

In Elliott on Roads and Streets, section 665, the author says: "In addition to the right of the public to maintain a suit in equity for an injunction, private citizens who are specially injured by an obstruction and interested in preventing its continuance may, upon a proper showing, maintain a suit in equity for an injunction." And at section 709, he says: "Injunction will also lie at the suit of the abutter, in a proper case. Thus, it will lie to prevent the depri-
vation of his right of access." See also Corning and others
26 v. Lowerre, 6 Johnson's Chy. Rep. p. 439; Newell v. Loss, 142 Ill. 104. There a bill was filed by a lot owner to enjoin the owner of another lot in the same sub-division from obstructing an alley. The injunction was awarded. The Court said: "But appellee's right is established by showing that she owns an easement—the right of passage—incident to her ownership of her lot. It is not necessary, in such a case, that the easement claimed by the grantee must be really necessary for the enjoyment of the estate granted. It is sufficient if it is highly convenient and beneficial therefor. Irreparable injury, as used in the law of injunctions, does not necessarily mean that the injury is beyond the possibility of compensation in damages nor that it must be very great; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one." Pettus v. Johnson et als., 56 Ind. 139; White v. Flannigain, 1 Md. p. 546; Ross v. Thompson, 78 Ind. p. 91; Van Witsen et als. v. Bertha Gutman, 79 Md. p. 405; Bent v. Trimboli, 61 W. Va., p. 509; Field v. Barling, 41 Am. St. Rep. p. 311; Pennsylvania v. The Wheeling Bridge Co. et als., 13 Howard, p. 518; Pettibone and others v. Hamilton and others, 40 Wis. 402; Branahan v. Hotel Co., 39 Ohio St., p. 333; Schopp v. St. Louis, 117 Mo. p. 131; Norfolk Railway Co. v. Turnpike Co., 100 Va., p. 244; Glasgow v. Matthews, 106 Va., p. 18; Dillon's Municipal Corporations, section 661, says: "As to the right to relief in equity, it may be considered as settled that a party entitled to a right of way over a street may be protected in the enjoyment thereof by restraining the erection of obstructions thereon." See also note to this section, where Judge Dillon says: "The author prefers the view taken of this subject in White v. Flannigan, 1 Md. p. 525, where the court, having regard to the nature and uses of a street in a populous place, and considering any obstruction which denies the exercise of the right to use it as working irreparable mischief to the street as a street, sustained the equity jurisdiction."

Chambers v. Roanoke Industrial & Agricultural Assn. et als., IV Virginia Appeals, p. 340.

It is argued that complainants have no rights because the destruction of the alley is not right in the rear of the complain-
27 ant's property. We do not think this argument is sound. It will be remembered that the alley was a public alley at the time complainants purchased their property, and they bought in reference to it. The alley was laid out and was a part of the general plan in that particular square, hence all persons purchasing property had the right to claim the benefit of the general plan of the square as it was laid out, and the purchaser's rights extended to all the streets and alleys marked on the plan. The purchaser of property is entitled to the use of a street as a street, and his rights are not confined to the space immediately in front of the ground bought by him. He is not circumscribed by the narrow limits of the street immediately adjoining his lot. If there are streets they inure to his benefit. If there are public alleys, he cannot be deprived of the privilege of enjoying them. See City of Indianapolis v. Kingberry, 101 Ind. p. 212; Gilbert v. Emerson, 60 Minn. p. 66; Wolfe et als v. Town of Sulliva, 133 Ind. p. 331; Elliott on Roads and Streets, section 120; Hodges v. Seaboard Roanoke R. Co., 88 Va. 662.

The Chambers Case.

This case is reported in IV Virginia Appeals, p. 340. It was decided September 15, 1910. The facts in the case are so similar to the facts in this case that it will serve well as a precedent.

Chambers owned a tract of land in the city of Roanoke consisting of 11 115-1000 acres. On January 16, 1906, he agreed to sell the Roanoke Industrial and Agricultural Assn. 10 acres of the land for $11,000.00 which he conveyed to the Assn. The land fronted on Franklin Road and Pleasant Avenue.

On July 10th the council of Roanoke passed an ordinance allowing the said association to occupy a strip of land 35 feet on the south side of Pleasant Ave. from Jefferson Street to Franklin Road for fair purposes. Chambers filed a bill to enjoin the Assn. from closing up the 35 feet mentioned in the ordinance, and a temporary injunction was awarded. The Assn. and the city of Roanoke demurred to the bill and also filed answers. One of the grounds of demurrer was as follows: "The complainant's bill shows no injury personal or peculiar to said complainant." And in its answer the Assn.
28 denied any intention of using or occupying any portion of Pleasant Avenue which lies west of its western property line or is in front of Chambers' premises. On the 6th day of August, 1906, the court entered the following decree: "And it appearing to the Court from the answer of the defendant, the Roanoke Industrial and Agricultural Association that it disclaims any purpose or intention to occupy any portion of Pleasant Avenue adjoining on the land of J. W. Chambers running back along Pleasant Avenue 185.3 feet from the South east corner of Pleasant Avenue and Franklin Road and the court being of the opinion that the injunc-

tion heretofore awarded above set forth was improvidently awarded, doth adjudge, order and decree that the same be and is hereby dismissed and dissolved, and this cause is continued."

The Court of Appeals, in an opinion by Judge Harrison, said: "We are of opinion that the court erred in its decree of August 6, 1906, dissolving the injunction theretofore granted restraining the appellee association from obstructing Pleasant Avenue in the manner alleged in the bill." It is submitted that the Chambers case meets every argument raised by the defendants and we think is decisive of this matter. If not, why? The petition for an appeal in this case states "Where a party buys with reference to streets he is entitled to an injunction without proving special damages." And cites 56 Atl. Rep. 272; 62 Atl. Rep. 778. It is plain that the court sustained this view.

Van Witsen et al. v. Gutman, 79 Md. p. 405.

This case is directly in point. The complainants filed a bill in equity in circuit court No. 2 of Baltimore City against Mrs. Bertha Gutman. It was alleged that she was engaged in erecting a permanent stone and brick wall across the southern part of Jew Alley in the city of Baltimore, and that this wall will completely deprive the complainants of their right of way over a portion of said alley. The prayer of the bill was that the defendant should be perpetually enjoined from obstructing the alley, and that she should be required to take down and remove the wall which had been erected.

In 1829 the trustees for the owners of a tract of land in Baltimore made a plat of the property, and on said plat laid off certain lots, and an alley running through said property from north to
29 south. Mrs. Gutman is the owner of ten of those lots, five of them binding on the east side of the alley, and five lying directly opposite on the west side. The complainants own other lots binding on the eastern side of the alley. The alley was a public alley.

On May 3, 1893, the city council of Baltimore authorized and directed the condemnation and closing of that portion of Jew Alley which bounds each side of the lots of Mrs. Gutman. Claiming authority from the ordinance and the proceedings thereunder, Mrs. Gutman commenced to build the wall in the bed of the alley which the complainants seek to abate. The Court said: "Mrs. Gutman owns lots on both sides of this alley at its southern extremity. The ordinance enacts that the portion of the alley shall be closed which lies between her lots." * * * "These ordinances * * * tend to consummate the same object, and must be considered as parts of the same transaction. The result of them would be that Mrs. Gutman would have access to her property by Marion Street on the south; and immediately north of her property the alley would be twenty-five feet wide for a distance of twenty-five feet, and from that point the original width of the alley would continue to Lexington Street; while all the other lots on the alley would be debarred from the access to them from Marion Street."

"The money paid by her for benefits is, of course, to be applied in satisfaction of the damages sustained by the complainants, and others in consequence of the closing. The (complainants) lose their easement in the closed portion and she is thereby enabled to erect a building upon it. This is palpably and plainly taking their private property for her private use. In other words, it is a forced sale to her of their property. The extinguishment of their interest does not appear to enure in any way to the public service; nor to tend to the relief of any public necessity, nor to promote any public interest, nor to subserve any public purpose, nor to be connected with anything used by the public, nor, in short, to have any relation to the public convenience or public welfare." * * * "It will be seen that we consider the ordinance for closing Jew Alley invalid. The decree must be reversed and the cause remanded in order that a decree may be passed in accordance with the prayer of the bill of complaint."

30 In Adams v. Chicago, B. & W. R. Co., 39 Minn. p. 293, the Court said: "It is, however, hardly necessary to inquire how the lot owner gets his private right in the street; for it is established law that he has a private right, which, as we have stated, all the cases concede extend to the necessity of access. Access to the lot is only one of the direct advantages which the street affords to it. * * * For purposes of access to the lots, a strip 10 or 15 feet wide might be sufficient. Yet everybody knows that a lot fronting on a street 60 or 70 feet wide is more valuable, because of the uses that can be made of it, than though it fronts on such a narrow strip. Take a case in one of the States where the fee of the streets is in the State or municipality, and of a street 60 feet wide. The abutting owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lot, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the State or municipality should attempt to cut the street down to a width of 10 or 15 feet, would it be an answer to objections by lot-owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer."

"The private right in a street is of course subordinate to the public right. The latter right is for use as a public street, and the incidental right to put and keep it in condition for such use, and for no other purpose. Whatever limitation or abridgement of the advantages which the abutting lot is entitled to from the street may be caused by the exercise of the public right, the owner of the lot must submit to." * * * "His right to complain arises when such interruption to the enjoyment of his private right are caused by a perversion of the street to uses for which it was not intended; by employing it for uses which the public right does not justify." It appears to us that this language applies with much force to petitioners' case. See also Elizabethtown, Lexington & Big Sandy R. Co. v. Combs, 10 Ky. Rep. p. 389.

Mr. Minor, Minor's Institutes, vol. IV, p. 121, says: "Whatever unlawfully works hurt, inconveniences or damage to another is a

nuisance; and such nuisance may be abated; that is taken away or removed by the party aggrieved thereby, so as he commit no
31 riot, nor breach of the peace in doing it." * * * "If a gate be erected, without leave of the court, across the public highway (which is a common or public nuisance) any citizen passing that way may cut it down and destroy it. The law allows this private and summary method of doing one's self justice, because injuries of this kind, which obstruct or annoy one in the enjoyment of such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice, but the party injured may seek redress by an action at law to recover damages for the injury done, or by bill in equity to abate the nuisance and to enjoin its continuance as incident thereto, to recover damages for the mischief actually done."

If the law allows one this summary method of redress, will he be denied the aid of a court of equity to prevent the erection of that, which he could destroy, if erected? The bill shows that the alley is of daily convenience and use to the complainants, and an obstruction of it will annoy them in the enjoyment of the very thing which they have been using continuously for more than twenty years. It would seem on this ground alone the complainants were entitled to an injunction. See Wilburn v. Raines, IV Virginia Appeals, p. 359; Elliott on Roads and Streets, section 660.

"Individual owners of abutting property" says Mr. Elliott, Elliot on Roads and Streets, section 403, "have a private interest in the highway distinct from the public, of which they can not be deprived without compensation. Of this right they cannot be deprived by any use that destroys the character of the road or street as a way for free and unobstructed passage. While, therefore, a highway may be used for public drains, the use must be such as will not destroy the original and primary character of the public way. The old rule that although there be an unlawful interference with a highway, "without a special grief shown by the plaintiff the action lies not, but is punishable in the leet," does not preclude adjoining property owners from maintaining an action for the destruction of a highway, for in such a case they have "a private grief."

It is contended by the defendants that the complainants have another way to the rear of their property, and hence cannot
32 complain of the obstruction of the alley here. The case of Sloss-Sheffield Steel & I. Co. v. Johnson (an Alabama case decided July 6, 1906), 8 L. R. A. New Series, p. 227, is a full and complete answer to the contention made by the defendants on this point. The Court says: "The obstruction by a public nuisance of the direct route between one's property and a neighboring city, so as to compel him to take a circuitous route to reach it, is such special injury as to entitle him to maintain a suit to abate the nuisance." On page 230, the Court continues: "If the direct and usual route of travel may be obstructed, there could certainly be no reason why the indirect routes might not also be closed one by one, until the lawful and criminal invasion of public roads put the unfortunate owner's property in a cul-de-sac, compelling a day's time instead of

a few moments of time, in going to business, church, or market. An individual might be entirely inclosed, and the value of his property destroyed, without affecting the public. The injury is thus clearly individual and special." Compare the language in Richmond v. Smith, 101 Va. 167, where the court says: "If one person can permanently use a highway for his own private purposes, so may all" * * * "it necessarily follows that there can be no rightful permanent use of the way for private purposes." In Young v. Rothrock, 121 Iowa, p. 595, decided October 29, 1903, the court said: "If, then, plaintiff has shown that the street which was obstructed led directly to his premises, and that the obstruction interfered with his access thereto, this is a sufficient showing of special damages to authorize him to maintain the suit."

The able and painstaking editor of the Lawyers' Reports Annotated, says, "The weight of authority is in accord with Sloss-Sheffield Steel & I. Co. v. Johnson, holding that an action will lie at the suit of a property owner who by reason of an obstruction in a public street or highway, is compelled to take a more circuitous route in order to reach his property even though such obstruction constitutes a public nuisance as in such cases the property owner suffers a special or peculiar injury different from that suffered by the public at large sufficient to entitle him to maintain an action. The Editor cites a number of cases to sustain his view. See note to above case.

33 The provisions of the new constitution should not be overlooked in a case like this. This new constitution recognizes a right of property in a highway which was not recognized under the old law. Before the constitution of 1902, the State could permit the obstruction of the highway, in the exercise of the right of eminent domain, and although a damage was done to one's property, unless there was an actual taking the law gave no remedy for the wrong. Now it is not a question of whether one's property is actually taken, but whether one suffers a damage from the taking of a street or any other property. If he does, the present organic law gives him a right of action. The relevancy of this constitutional change is, that in the case of Tidewater R. Co. v. Shartzer, 107 Va. p. 562, the court quotes with approval the case of Rigney v. City of Chicago, 102 Ill. p. 64. In the Rigney case the Illinois Court said: "It is not claimed or pretended that the plaintiff's possession has been disturbed, or that any direct physical injury has been done to his premises by reason of the obstruction in question. The gravamen of the plaintiff's complaint is, that the defendent, in cutting of- his communication with Halsted Street by way of Kinzie Street, has deprived him of a public right which he enjoyed in connection with his premises, and thereby inflicted upon him an injury in excess of that shared by him with the public generally, and it is for this excess he seeks to recover, and nothing more." Held the city was liable for damages under the constitution of 1870, from which the language of our constitution was taken.

It is true the Rigney case applied to the taking of property for public uses, but the point established was that Rigney's right

to a free and unobstructed access from the highway to his premises was a property right protected by the constitution, even though the obstruction in the highway was not in front of his property. It thus becomes a question of interest. If Rigney could assert against the city of Chicago a claim for damages for an obstruction in the street which was authorized by the city for public services, the same right could certainly be asserted against individuals for an unauthorized obstruction erected by private persons for private use. If this were not true, then private individuals could commit wrongs for which they would not be responsible, when, if the same act was committed by a public service corporation, it would be liable. The injury to the complainants from the destruction of the alley
34 is just as great to them, though committed by individuals, as if it had been taken by some company for public purposes. It follows, therefore, so it seems to us, that if this were a taking for public service, compensation would have to be made to the complainants, but since it is a taking by private individuals for private uses and unlawful, a court of equity should interfere.

It is said by Mr. Elliott, Elliott on Roads and Streets, section 815, in discussing this question, * * * "But in some jurisdictions, in most of which constitutional or statutory provisions exist requiring compensation where property is "injured" or "damaged," it has been held that a property owner may be entitled to damages, although the obstruction is not directly in front of his premises, and, in some instances, even though his property may not directly abut upon the street."

The alley unquestionably adds to the enjoyment by the complainants of their property and gives it an additional value. This additional value caused by the public alley, is protected by the constitution and the complainants cannot be deprived of it by the defendants for private use. Rigney v. Chicago, 102 Ill. p. 64. See also City of New York v. Rice, 198 N. Y. 125.

We have pointed out that the alley, mentioned in the bill, was dedicated for a specific purpose—a public alley. Therefore, equity should take jurisdiction and enjoin any use of it inconsistent with the definite purpose of the grant. Minor on Real Property, section 1355; see also the authorities cited above. In Price et al. v. Thompson et al., 48 Mo. p. 365, the Court said: "Nothing I think, can be clearer than that if a grant is made for a specific, limited and definite purpose, the subject of the grant cannot be used for another purpose. The town took the premises as a trustee with the obligations attached, as well as the privileges conferred, and it was not competent for it to direct them to a use or purpose foreign to the expressed intention of the grantor."

The trespass complained of goes to the destruction of the alley in the character in which it has been held and enjoyed, and for this reason also the injunction should be awarded. See White v. Flannigain, 54 Am. Dec. p. 668, and note to case; Gilbert et als. v. Arnold et als., 30 Md. p. 37.

35 That the complainants are properly joined, we think, is settled. In Roper and als. v. McWhorter, 77 Va., p. 217, this

court said: "And in Bull v. Read, 13 Gratt., 87, this court said, it is allowable, according to settled practice, for some to file a bill on behalf of themselves and others, inhabitants similarly situated, seeking any relief, to which they might all in common be justly entitled, although their individual interests might be several and distinct." See also Pettibone and others v. Hamilton and another, 40 Wis. p. 403; Elliott on Roads and Streets, section 668; Hogg's Equity Procedure, section 84 and note, "Where the parties have a common interest to be promoted by suit, they may all unite therein as complainants." Mitford's and Tyler's Pleading and Practice in Equity, page 18.

It is contended that the City of Richmond is not a proper party defendant. We believe this contention is without merit. The City of Richmond was and is a party to the dedication, and it is obvious that it is a proper party defendant to this suit. "The rule" says Mr. Hogg, Hogg's Equity Procedure, section 86, "applying here is that all persons concerned in the subject-matter of the suit may properly be joined as defendants, nor is it essential that all the parties shall have an interest in all the matters contained in the suit. It is sufficient if each party is concerned in some of the matters involved in it, and they are connected with the others." The ordinance complained of contains penalties for its violation, and this ordinance the complainants seek to have declared null and void, and it is clear that the city of Richmond has the right to defend her own by-laws, and when one is attacked as here she is a proper party. We think this matter is governed by the statute, section 3263*a* of the Code, giving the court power to abate as to any party improperly joined, and that misjoinder is no good ground for demurrer.

The Court erred in refusing leave to the complainants to amend their bill, and in rejecting the complainants' bill as amended.

The original bill was filed in this case on the 12th day of December, 1910, in vacation. There was no appearance by the defendants until the 20th day of December, 1910, when the questions raised by the demurrers were argued. The Court took the
36 matter under advisement, and not until the 17th day of January, 1911, did it make known its decision. Counsel for complainants immediately notified counsel for the defendants that they would ask leave to amend their bill. Accordingly, they presented their amended bill to the Court which the court rejected.

The complainants contended, and still contend, that the original bill was good on demurrer, but on that point the court decided against them. If a party honestly believes and contends that the facts set forth in his bill are sufficient on a demurrer, and honestly submits the matter to the court for decision, is he to be denied the right to amend if the decision of the court is adverse? We never understood such to be the practice. If such was the practice, a plaintiff would be afraid to risk his case on demurrer, but would file an amended bill, and often when it would be unnecessary. Such a rule would work a hardship. It would often prevent the court from getting at the facts of a case.

The complainants did not make a new case in their amended bill. They simply brought forward additional facts to meet the decision of the court on the demurrer. The complainants were not invited to amend their bill, and the situation was known to the defendants as well as to the complainants. No advantage could have been taken or wrong done the defendants by allowing the amended bill in this case, as the object of the amendment was simply to show with greater particularity the injuries that would result to the complainants from the closing of the alley. The amended bill is set forth on page 38 of the record.

In Barton's Chancery Practice, p. 345, Mr. Barton says: "Amendments are largely in the discretion of the court, and are allowed with great liberality until the proofs are closed." * * * And on page 346, he says: * * * "To form some definite idea on this subject attention is called to the following cases in which amended bills have been recognized as proper to be filed: * * * "Where after hearing a motion for the dissolution of an injunction, and the delivery of the court's opinion that the injunction should be dissolved and the bill dismissed, it was held that the injunction might be retained, and the party permitted to amend by
37 altering the frame and the averments of the bill."

In Neale v. Neale, 9 Wall. p. 590, the Court said: "It is insisted * * * that after a cause has been heard, the power of allowing amendments ceases, or if it exists at all, it cannot go so far as to authorize a plaintiff to change the framework of his bill, and make an entirely new case, although on the same subject matter." * * *

"This doctrine," says the court, "would deny to a court of equity the power to grant amendments after the cause was heard and before decree was passed, no matter how manifest it was that the purposes of substantial justice required it, and would, if sanctioned, frequently embarrass the court in its efforts to adjust the proper mode and measure of relief. To accomplish the object for which a court of equity was created, it has the power to adopt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose, unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms, that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleading, permit amendments, both of bills and answers, is sustained by the authorities."

We have already pointed out that no advantage could have been taken if the amendment had been allowed, and we ask have the defendants any reasonable ground upon which to base their objection? If so, what? Why should the defendants complain? They would not have been prejudiced to any greater extent if the amendment had been allowed than they would have been if a new bill had been filed. Belton v. Apperson & Al., 26 Grat. p. 207: "The tendency of the decided cases is to relax the ancient rules and allow

amendments whenever it best serves the ends of justice so to do." Barton's Ch. Pr. p. 345, note 6. In Kelly v. Gwatkin and others, 108 Va. p. 6, the court said: "Courts of equity in this State are liberal in allowing amendments of bills, and where the purpose of the amendment is not to introduce a substantive cause of action different from that stated in the original bill, but merely to
38 set forth with greater particularity of averment matters arising out of the same transaction, and germane to the objects for which the original bill was filed, the amendment should be allowed."

In Tidball v. Shenandoah National Bank, 100 Va. p. 741, one of the assignments of error was that the amended bill was filed too late. The court said: "The rule generally prevailing seems to be that such amendments will be permitted as have for their object the trial and determination of the subject-matter of the controversy upon which the action was originally based, but * * * if the plaintiff, in the amended declaration, is attempting to assert rights and to enforce claims arising out of the same transaction, act, agreement, or obligation, however great may be the difference in the form of liability as contained in the amended from that stated in the original declaration, it will not be regarded as for a new cause of action." "If the contention of appellant's counsel were correct, a pleading which omitted some essential allegation could never be amended. This is clearly not the law. It is the settled practice in this State that such amendments can be made, and it would be a reproach to the administration of justice if they could not."

In Hogg's Equity Procedure, section 322, the law is stated as follows: "If the defect in the bill be curable by any proper amendment, it may be amended after a demurrer has been sustained to the bill, or plea has been filed thereto, after the depositions have been taken in the cause." * * * "So the bill may be amended at the hearing, and such amendment may go to the extent of conforming the bill to the case made by the proof, if the proposed amendment does not make a new case from that shown by the original bill." * * * "In short, the bill may be amended at any time before final decree, in the sound discretion of the court, if the ends of justice demand it." See also the Virginia authorities cited in the note.

In Jackson v. Valley Tie Co., 108 Va., p. 714, cited by the learned Judge of the Chancery Court as authority for the proposition that the complainants could not amend, the facts are so different from this case that we do not think it applicable. In the Jackson case, p. 722, the court said: "The refusal of the court to consider the
39 amended and supplemental petition tendered by appellant was upon the ground that the petition merely stated in writing the ground upon which the trustee's motion to abate was based, which written statement the trustee had formerly refused to furnish, and because this matter had been heard and determined." And on page 723, the court says: "It (the amended and supplemental petition) "alleges no new matter, but is purely and simply a second motion to abate the attachment, based upon the identical grounds upon

which was based the previous motion to abate." Under these facts, we submit, the Jackson case is no authority for the refusal of the court in allowing complainants to amend their bill.

It will be observed that this is a case in which the complainants do not ask that the defendants surrender any rights, or give up any property or thing belonging to them. The complainants simply seek the aid of the court in protecting their rights in the alley, so that they will not be annoyed and inconvenienced and their property damaged by a destruction of the highway.

For the foregoing, and such other reasons as may be urged upon oral argument, petitioners pray that an appeal and supersedeas may be allowed to the said final decree of the Chancery Court of the City of Richmond, pronounced on the 6th day of March, 1911; that the said ordinance of the City of Richmond may be declared null and void; and that the said decree may be reviewed by this honorable court and reversed.

And your petitioners will ever pray, etc.

N. W. BOWE,
ANN CLAY CRENSHAW,
ELLIE W. PUTNEY, AND
CHANNING M. BOLTON.
By COUNSEL.

DAVID MEADE WHITE,
RICHARD EVELYN BYRD, *p. q.*

We, Richard Evelyn Bird and David Meade White, attorneys, practicing in the Supreme Court of Appeals of Virginia, do certify that in our opinion the said decree of March 6, 1911, is erroneous, and that it is proper that the decision should be reviewed by the Supreme Court of Appeals and reversed.

RICHARD EVELYN BYRD.
DAVID MEADE WHITE.

Received April 15, 1911.
G. M. H.

Appeal allowed and supersedeas awarded—Bond $200.00.
GEORGE M. HARRISON.

To the Clerk of the Supreme Court of Appeals, at Richmond, Virginia:

VIRGINIA:

Pleas Before the Judge of the Chancery Court of the City of Richmond, the 6th Day of March, 1911.

Be it remembered, that heretofore, to-wit: on the 13th day of August, 1910, came the plaintiffs, by counsel, and sued out of the Clerk's Office of the Chancery Court subpœnas in chancery against the defendants, directed to the proper officers, and returnable to the

first Monday in September, 1910, which subpœnas in chancery and returns of the officers thereon are in due form.

And at another day, to-wit: On the 12th day of August, 1910, came the plaintiffs, N. W. Bowe, Ann Clay Crenshaw, Ellie W. Putney and Channing M. Bolton, by counsel, and filed their bill before the Judge of this court, in vacation, which bill and the exhibits therewith are in the words and figures following, to-wit:

Bill.

41 VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, and CHANNING M. BOLTON, Complainants,

v.

ELIZABETH S. SCOTT, FRED W. SCOTT, E. T. D. MYERS, JR., and THE CITY OF RICHMOND, a Municipal Corporation, Defendants.

To the Honorable Daniel Grinnan, Judge of the Chancery Court of the City of Richmond:

Humbly complaining sheweth unto your honor, your complainants, N. W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, the following facts:

1. That your complainants are citizens of the State of Virginia; that they own real estate in the City of Richmond, in the State of Virginia, upon which they pay taxes to the State of Virginia and the City of Richmond; that N. W. Bowe owns the real estate on the south side of west Franklin Street in the said City, known as No. 917 West Franklin Street, where he resides; that Ann Clay Crenshaw owns the real estate on the south side of West Franklin Street, in said City, known as No. 919 West Franklin Street, where she resides; that Ellie W. Putney owns the real estate on the south side of West Franklin Street, in said City, known as No. 921 West Franklin Street; and that Channing M. Bolton owns the real estate on the east side of Harrison Street, in said City, known as No. 327 North Harrison Street.

2. That the said real estate belonging to your complainants, the said N. W. Bowe, Ann Clay Crenshaw, and Ellie W. Putney fronts on the south side of West Franklin Street, between Shafer and Harrison Streets, in said City, ninety-nine feet and four inches, more or less, and runs back southwardly between parallel lines a distance of 150 feet to and abuts on a public alley twenty feet wide. That the real estate, No. 327 North Harrison Street, in said City, belonging to your complainant, the said Channing M. Bolton, fronts on the east line of Harrison Street and runs back along the said public
42 alley a distance of 150 feet. That complainants file herewith a blue print made by T. C. Redd & Bro., on the 10th

day of March, 1910, marked Exhibit No. 1, showing the location of the real estate owned by your complainants on Franklin and Harrison Streets and the public alley twenty feet wide, between Shafer and Harrison Streets, and they pray that the same may be considered and treated as a part of this bill. That the said alley was a public alley at the time complainants purchased said property and the purchase was made in reference to it.

3. That on the 31st day of March, in the year 1852, Caroline N. Pollard for a valuable consideration, conveyed to John C. Shafer that certain tract or parcel of ground lying and being in the County of Henrico, in John Buchanan's old field near the western boundary of the City of Richmond, containing four acres, it being the same real estate conveyed to the said Caroline N. Pollard by deed from William W. Gregory and wife, dated on the 20th day of July, 1848, and recorded in the Clerk's Office of Henrico County Court on the 22nd day of July, 1848, in Deed Book 53, page 411. That the property mentioned and described in the said deed is the same real estate that now lies west of Shafer Street, between Franklin Street and Park Avenue, in the City of Richmond, and running west between the said streets for a distance of 362 feet three inches, and is shown in Exhibit No. 1, filed with this bill. That the said John C. Shafer owned the said real estate in fee simple in the year 1867, when the boundaries of the City of Richmond were extended and the said property taken within the boundary of the City of Richmond; that sometime between the years 1867 and 1875, the said John C. Shafer divided his land by opening a public alley sixteen feet wide between the northern part and the southern portion of his said land mentioned above, so that in the year 1875 the said public alley dividing the property of the said John C. Shafer and running from Shafer Street to Harrison Street, was only 16 feet wide. That on the 31st day of May, 1887, the said John C. Shafer dedicated to the public four more feet of his said land and opened to the public an alley twenty feet wide, so that from the 31st day of May, 1887, up to the present time the public alley dedicated as aforesaid and extending from Shafer to Harrison Street has been a public alley and
43 highway twenty feet wide and opened and used by the public and your complainants continuously and uninterruptedly for a period of more than twenty years. That on the 31st day of May, 1887, the said John C. Shafer and wife conveyed a portion of his said real estate that was conveyed to him by the said Caroline N. Pollard on the 31st day of March, 1852, to Lewis Ginter, and filed with his deed to the said Lewis Ginter a map or plat showing the property and the public alley twenty feet wide extending between Shafer and Harrison Streets and parallel with Franklin Street. That the acts and deeds of the said John C. Shafer in opening the said alley to the public in the way he did constituted a dedication to the public both at common law and under the statute and laws in such cases made and provided, of the twenty feet of ground which were regularly laid off, used and accepted as and for a public alley and highway. Complainants file herewith a certified copy of the deed from John C. Shafer to the said Lewis Ginter, dated on the 31st day of May, 1887, with the

map of John C. Shafer's property, in the City of Richmond, between Park Avenue and Franklin Street, marked Exhibit No. 2, and they pray that the same may be read and treated as a part of this bill.

4. Complainants state that the twenty feet of ground dedicated by the said John C. Shafer as and for a public alley was accepted by the City of Richmond, by its duly authorized agents, as and for a public alley and highway, and the said City of Richmond for more than twenty years has treated and regarded and still treats and regards the said alley as a public alley and highway. That the City of Richmond has a sewer in the said alley from Harrison Street, eastwardly up to the land now owned by Mrs. Elizabeth S. Scott, which said land is shown in Exhibit No. 1; that the said sewer was constructed upon the petition of Fred W. Scott and paid for by the City of Richmond. That a 12 inch T. C. Pipe sewer is in the said alley draining the houses on Shafer Street, south of the said alley, as well as the property at Nos. 902 and 904 Park Avenue, which sewer was built by the City of Richmond at its own cost and expense. That in addition to the said sewers, the Council of the City of Richmond, in the year 1901, granted to the Southern Bell Telephone and Telegraph Company permission to lay 6 duct conduits in the said alley.

44 5. Complainants further state that the said alley was paved with granite blocks from Harrison to Shafer Street by your complainants and other property owners abutting upon the said alley about twenty years ago at their own proper costs and expense, and that for more than twenty years the said alley has been used by your complainants and the public as and for a public alley and highway. That the said public alley is a continuation of a public alley and highway running west from Laurel Street, in said City, out to Lombardy Street, in said City, and is used and has been used and traveled over by the public and your complainants for more than twenty years; that under an ordinance of the City of Richmond it is unlawful for any person to drive vehicles carrying or designed to carry loads of greater weight than 1,000 pounds along Franklin Street and Park Avenue and that the said public alley or highway has been used by the public for travel for such wagons and vehicles as are prohibited from traveling on Franklin Street and Park Avenue.

6. Complainants state that on the 2nd day of May, 1910, Elizabeth S. Scott and E. T. D. Myers, Jr., presented to the Council of the City of Richmond a petition asking that the said alley and highway for a distance of 130 feet and 11 inches, or so much of the twenty foot alley running from Shafer Street to Harrison Street as lies between the front and rear lots belonging to the said Elizabeth S. Scott and E. T. D. Myers, Jr., be closed; that a copy of the said petition is herewith filed, marked Exhibit No. 3, and your complainants pray that it may be read and considered as a part of this bill. That on the 2nd day of May, 1910, the said petition was referred by the Council of the City of Richmond to the Committee on Streets—one of the Committees of the Common Council of the City of Richmond—and on the 5th day of July, 1910, the said Committee on

Streets returned to the Common Council of the City of Richmond the said petition together with an ordinance which it recommended to the Common Council of Richmond for adoption. A copy of the report of the said Committee on Streets to the Common Council of the City of Richmond is herewith filed marked Exhibit No. 4, and your complainants pray that it may be read and considered as a part of this bill.

Complainants further state that the City of Richmond is a municipal corporation; that the administration and government of
45 the said City is vested in the mayor, and two boards, called respectively the common council and board of aldermen of the City of Richmond. That the ordinance recommended by the said Committee on Streets was in the following words and figures, to-wit:

"An Ordinance.

To Close the Portion of an Alley Extending from Shafer Street to Harrison Street located Between Franklin Street and Park Avenue.

Be in ordained by the Council of the City of Richmond:

1. That upon the petition of Elizabeth S. Scott and E. T. D. Myers, Jr., the portion of the alley now extending from Shafer Street to Harrison Street located between Franklin Street and Park Avenue, commencing at a point one hundred and eighty-five feet six inches from the west line of Shafer Street for one hundred and ninety-three feet seven and one-half inches, of which one hundred and fifty-eight feet seven and one-half inches, a part thereof, lying between the lot of the said Elizabeth S. Scott on the South and her lot on the North, and thirty-five feet, the residue thereof, lying between the lot of the said E. T. D. Myers, Jr., on the South and his lot on the north, be, and the same is hereby closed to public use and travel, provided, however, that the said abutting property owners, their heirs and assigns shall not erect, construct or maintain any dwelling, stable, shed or house of any kind on the portion of the alley so closed.

2. That the rights hereby granted shall expire by limitation thirty years from the passage of this ordinance, and the said City of Richmond hereby expressly reserves the right to amend or repeal this ordinance, and to require, at its pleasure, the reopening and establishment as a public alley of the portion of said alley hereby closed, without compensation to said abutting land owners, their heirs or assigns; and at the expiration of the rights hereby granted or in the event said alley is re-opened and re-established, abutting land owners, their heirs or assigns, shall pave said portion of said alley and put the same in proper condition and repair satisfactory to the City Engineer.

46 3. That the said Elizabeth S. Scott and E. T. D. Myers, Jr., their heirs, executors, administrators, assigns and subsequent owners of the said abutting property shall indemnify and save harmless the City of Richmond from all damages of whatever

nature, arising or claimed by any person to person or property, growing directly or indirectly out of the closing of the said alley, and shall defend at their own costs and charges any suit or suits brought by any person to recover damages growing out of such closing and to that end the said Elizabeth S. Scott and E. T. D. Myers, Jr., shall execute unto the said City of Richmond a bond in the penalty of Ten Thousand Dollars ($10,000) with surety satisfactory to the City Attorney, conditional that they, their heirs and assigns, will at all times indemnify and save harmless the said City of Richmond against any and all such damages to person or property which may be occasioned by the closing of said alley, as well as all costs and charges growing out of the defence of any suit or suits brought on account of such closing.

4. Any person violating any of the provisions of this ordinance shall be liable to a fine of not less than twenty-five nor more than one hundred dollars, recoverable before the Police Justice of the City of Richmond, each days continuance of such violation to be a separate offense.

5. This ordinance shall be in force from its passage."

8. Complainants state that the said ordinance was adopted by the Common Council on July 5, 1910, and concurred in by the Board of Alderman on July 12, 1910, and presented to the Mayor on the 15th of July, 1910. The Mayor of the said City did not approve the said ordinance, but vetoed the same upon the ground that the said ordinance was contrary to public policy, and returned the said ordinance to the common council in which branch it originated. Complainants file herewith a copy of the veto of the Mayor of the said City, marked Exhibit No. 5, and pray that it may be read and considered as a part of this bill. Complainants further show that the said ordinance was passed by the Common Council over the veto of the Mayor on the 1st day of August, 1910, and concurred in by the Board of Aldermen on the 9th day of August, 1910.

47 9. Complainants charge and aver that the act of the Common Council of the City of Richmond in passing the said ordinance over the veto of the Mayor of the said City is an unwarranted attempt on the part of the Common Council of the City of Richmond to give the exclusive use of the public property—mentioned in the ordinance—to Elizabeth S. Scott and E. T. D. Myers, Jr., for a period of thirty years, without consideration to the City and prejudicial to the rights of your complainants and harmful to the public at large. That while the said ordinance does not say what rights are granted to the said Elizabeth S. Scott and E. T. D. Myers, Jr., in and to the said public alley, it is understood and believed by your complainants, and they so charge and aver, that the said Elizabeth S. Scott and E. T. D. Myers, Jr., will close the said public alley at the points mentioned in the said ordinance and turn the enclosed portion of the said public alley into a yard for their own private and exclusive use and enjoyment and to the exclusion of your complainants and the public, so that your complainants and the public will not be able to use the said alley and pass and repass

over and along it which they have been doing without interruption and as a matter of right for more than twenty years.

10. Your complainants charge and aver that the said ordinance is invalid and void for the following reasons:

(*a*) That the Common Council of the City of Richmond had no authority to pass the said ordinance:

(*b*) That the act of the Common Council of the City of Richmond in attempting to pass the said ordinance was ultra vires:

(*c*) That the ordinance is an attempt to take from your complainants, whose property adjoins and abuts upon the said alley, their rights in and to the said alley without due process of law:

(*d*) That the ordinance materially impairs the access of complainants to their premises, and attempts to give to Elizabeth S. Scott and E. T. D. Myers, Jr., public property for their pri-
48 vate use and enjoyment and authorize a public nuisance:

(*e*) That the said ordinance is contrary to public policy; that it gives a private use to public property, and was passed in violation of section 1033*f* of the Code of Virginia, 1904:

(*f*) That the title to the ordinance is not broad enough to indicate its purpose and to include paragraphs 2, 3, and 4 of the said ordinance:

(*g*) That the said ordinance is vague and indefinite and does not state what rights are granted to the said Elizabeth S. Scott and E. T. D. Myers, Jr., in and to the said alley.

11. Complainants charge and aver that their property abuts and adjoins the said public alley, and that it is the direct way leading from Shafer Street to the rear of the premises and from their premises to Shafer Street; that they have used the said alley or highway to pass and repass from the rear of their premises to said Shafer Street continuously and uninterruptedly in common with the public for a period of more than twenty years; that the use of the said public alley to pass and repass from the rear of their premises is of much value to your complainants as well as to the public, and that if the said alley is closed your complainants' rights in the said public way or alley will be impaired and their property damaged.

12. Complainants charge and aver that that portion of the said alley ordered to be closed by the said ordinance and granted to the said Elizabeth S. Scott and E. T. D. Myers, Jr., for their private use and enjoyment to the exclusion of the use and enjoyment by your complainants and the public, was dedicated to the public by John C. Shafer who owned the fee, as and for a public alley, and the Common Council of the City of Richmond had no authority to devote the property or any portion of it, or authorize any one else to devote it, to a use which is inconsistent with the use to which it was dedicated by the said John C. Shafer.

13. Complainants charge and aver that the said ordinance is null and void because it is in conflict with section 10, article 1, of
49 the Constitution of the United States; that it impairs the obligation of the contract between the said John C. Shafer, who dedicated the land as and for a public alley, the City of Richmond, which alley was accepted by the City of Richmond as an alley for public use.

14. Complainants charge and aver that the said alley or way is of a particular benefit and advantage to them and to each of them; that their property adjoins and abuts upon the said alley; that it is the direct way from and to the rear of the property for provisions, coal and such other things as are brought in from the rear of their premises; that their right of egress and ingress from the rear of their property will be irreparably impaired if the said public alley is closed and they are denied the right of passage through the said public way.

15. Complainants further state that the said Elizabeth S. Scott and E. T. D. Myers, Jr., will act under the said void ordinance and will close the said alley, so that your complainants and the public will not be able to pass and repass through the said alley, unless an injunction is awarded immediately enjoining and restraining them from closing the said alley to your complainants and the public.

In tender consideration whereof, and forasmuch as your complainants are remediless save in a Court of equity, where such matters are alone and properly cognizable, and to the end that justice may be done, your complainants pray that Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and the City of Richmond, a municipal corporation, may be made parties defendant to this bill and be required to answer the same, but not under oath, answers under oath being hereby expressly waived; that the said ordinance of the City of Richmond, passed as aforesaid, be declared null and void; that an injunction enjoining and restraining the said Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and the City of Richmond, their agents, servants and employees from closing any portion of the said public alley running between Shafer Street and Harrison Street, south of Franklin Street and parallel therewith in the said City, so as to obstruct the free passage of your complainants and the
50 public through the said alley; that the said Elizabeth S. Scott, Fred W. Scott and E. T. D. Myers, Jr., their servants and employees be restrained and enjoined from exercising any rights or privileges under the said void ordinance; that proper process may issue; and that your complainants may have such other, further and general relief as the nature of their case may require or to equity may seem meet.

And your complainants will ever pray, etc.

N. W. BOWE,
ANN CLAY CRENSHAW,
ELLIE W. PUTNEY, AND
CHANNING M. BOLTON,
By COUNSEL.

DAVID MEADE WHITE,
RICHARD EVELYN BYRD, *p. q.*

STATE OF VIRGINIA,
City of Richmond, To wit:

I, George B. White, a Notary Public for the City aforesaid, in the State of Virginia, do certify that N. W. Bowe personally appeared

before me in my City aforesaid, and made oath that the statements contained in the foregoing bill, so far as made on his own knowledge, are true; and so far as made on the information derived from others, he believes them to be true.

Given under my hand this 11th day of August, A. D., 1910.

GEORGE B. WHITE,
Notary Public.

My commission expires on the 26th day of July, 1912.

GEORGE B. WHITE,
Notary Public.

EXHIBIT No. 2, FILED WITH BILL.

This deed, made this (31st) thirty-first day of May, A. D.,
51 1887, between John C. Shafer, and Clara A., his wife, parties of the first part, and Lewis Ginter, party of the second part all of the City of Richmond, State of Virginia, Witnesseth, That in consideration of the sum of Fifty-five Thousand Dollars ($55,000.00) cash in hand paid by the said Lewis Ginter to the said John C. Shafer before the delivery of these presents the receipt whereof is hereby acknowledged, the said parties of the first part do grant unto the said party of the second part the following properties, to-wit:

1st. All that certain lot or parcel of ground fronting on the south side of Franklin Street, beginning at the southwest corner of Franklin and Shafer Streets, and running westwardly a distance of three hundred and forty-five (345) feet and two (2) inches, to the line of Dr. Beattie's lot, thence southwardly and at right angles a distance of one hundred and fifty (150) feet, to a public alley twenty (20) feet wide, thence eastwardly and at right angles, a distance of Three Hundred and Firty-six (346) feet, and six (6) inches, thence northwardly and at right angles a distance of One Hundred and Fifty (150) feet to the point of beginning.

2nd. All that certain other lot or parcel of ground, lying on the south side of said alley, and beginning at a point twenty (20) feet from the northwest corner of the brick walls now enclosing the home lot of the said John C. Shafer, and running westwardly along the line of said alley a distance of two hundred and forty-one feet (241) to a point on the easterly line of the land belonging to the estate of Charles Y. Morris, deceased, thence at right angles and southwardly a distance of ninety-seven (97) feet and two (2) inches, to another alley in rear sixteen (16) feet wide, thence along the line of said alley eastwardly a distance of two hundred and forty-one (241) feet, thence at right angles and northwardly a distance of ninety-seven (97) feet and (7) inches to the point of beginning.

3rd. A right in common to a strip of ground twenty (20) feet wide, lying between the brick wall which marks the western line or boundary of the home enclosure of the said John C. Shafer and the eastward line of the lot herein described, and running back in a

southerly direction ninety-seven (97) feet, and seven (7)
52 inches. The said strip of land is to be held as the joint property of the parties to this deed, and is to be forever kept open and used as their private alley and at their joint expense.

The metes and bounds of the property hereby conveyed are accurately set forth upon a map or plat made by James T. Redd, Surveyor of Henrico County, bearing date May 26, A. D., 1887—hereto annexed and made a part of this deed.

And the said John C. Shafer covenants that he has the right to convey the said lands to the grantee; that he has done no act to encumber the same, and that he will execute such further assurance thereof as may be requisite.

Witness the following signatures and seals.

JNO. C. SHAFER. [SEAL.]
CLARA A. SHAFER. [SEAL.]

STATE OF VIRGINIA,
City of Richmond, To wit:

I, Joseph M. Skinner, a Notary Public in and for the corporation of Richmond, aforesaid, in the State of Virginia, do certify that Clara A. Shafer, the wife of John C. Shafer, whose names are signed to the writing above, bearing date on the 31st day of May, A. D., 1887, personally appeared before me in the Corporation and State aforesaid (and being examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her she the said Clara A. Shafer, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and wished not to retract it.

And I do also certify that at the same time and place the said John C. Shafer, also in my presence acknowledged the said writing.

Given under my hand this 31st day of May, 1887.

J. M. SKINNER,
Notary Public.

(For plat see Record MS., page 18.)

CITY OF RICHMOND, *To wit:*

53 In the Office of the Court of Chancery for the said City, the 31st Day of May, 1887.

This deed was presented and with the certificate and plat annexed admitted to record at half past two o'clock P. M.

Teste:

BENJ. H. BERRY, *Clerk.*

A Copy—Teste:
CHAS. O. SAVILLE, *Clerk,*
Per J. T. POINDEXTER, *D. C.*

EXHIBIT No. 3 FILED WITH THE BILL.

To the Council of the City of Richmond:

Your undersigned petitioners, Elizabeth S. Scott, wife of Frederick W. Scott, and E. T. D. Myers, Jr., both of Richmond, Virginia, respectfully represent that they are the owners of two adjoining lots of land, in the City of Richmond, fronting 159 feet, 5 inches, and 35 feet, respectively, on the Southern line of Franklin Street, between Shafer and Harrison Streets, each of which lots runs back from said front Southwardly, between parallel lines, 150 feet, 9 inches, more or less, to the Northern line of a 20 foot alley, extending from Shafer to Harrison Street.

Your petitioners further represent that each of them also owns a lot of land immediately in the rear of their respective lots of land *immediately in the rear of their respective lots of land* mentioned above, fronting on the Southern line of said alley and having exactly the same frontage thereon that their respective lots first above mentioned have on Franklin Street. This rear lot of your petitioner, Elizabeth S. Scott, extends back Southwardly, between parallel lines, 98 feet, 6 inches, to the Northern line of another alley 16 feet wide; while the said rear lot of your petitioner, E. T. D. Myers, Jr., extends back southwardly, between parallel lines, 32 feet, 5 inches, more or less, to a lot belonging to Mrs. Ann Clay Crenshaw, all of which will fully appear from the map of the entire block of land bounded by Franklin, Shafer, Park Avenue and
54 Harrison Streets, filed herewith as a part of this petition.

The two rear lots of your petitioners are parts of an interior lot of land in or near the centre of the block. The Eastern portion of the residue of said interior lot is owned by Miss Grace Arents and is immediately in the rear of a part of her residence lot on the corner of Franklin and Shafer Streets; while the western portion of the residue of this interior lot (that portion thereof lying immediately in the rear of the lot of your petitioner E. T. D. Myers, Jr.,) is owned by Mrs. Ann Clay Crenshaw. This entire lot is surrounded by public alleys. The alley bounding it on the East connects with a 16 foot alley running through to Park Avenue; while the alley bounding it on the South, which leads to Harrison Street, meets with a 20 foot alley bounding it on the West. The alley which bounds it on the West connects with said 20 foot alley which bounds it on the North and runs to a certain point in said block South of said interior lot where it connects, at right angles, with a 19 foot alley which leads out to Harrison Street. It will thus be seen that if the 20 foot alley which separates the front and rear lots of your petitioners is closed, as your petitioners will hereafter pray, every lot in this block will still have one or more alleys connections with one or more Streets.

Your petitioners, therefore, pray that the Council may close so much of said 20 foot alley running from Shafer to Harrison Streets

as lies between the said front and rear lots of your respective petitioners.

Respectfully submitted,

ELIZABETH SHAFER SCOTT,
By FRED W. SCOTT.
E. T. D. MYERS, JR.,
By LEAKE & BUFORD,
His Attorneys.

Richmond, Virginia, May 2, 1910.

EXHIBIT No. 4 FILED WITH BILL.

RICHMOND, VIRGINIA, *July* 5, 1910.

55 To the Council of the City of Richmond.

GENTLEMEN: The Committee on Streets beg leave respectfully to return the accompanying Petition of Elizabeth S. Scott and E. T. D. Myers, Jr., to close portion alley between Shafer and Harrison Street and Franklin Street and Park Avenue, with accompanying Blue Print referred to the Committee on Streets by the Common Council May 2, 1910, and recommend the adoption of the accompanying "Ordinance to close the portion of an alley extending from Shafer Street to Harrison Street, located between Franklin Street and Park Avenue."

Very respectfully,

W. H. ADAMS,
Chairman Committee on Streets.

EXHIBIT No. 5 FILED WITH THE BILL.

RICHMOND, VA., *July* 19, 1910.

To the Honorable Council of the City of Richmond.

GENTLEMEN: I am constrained to return without my approval to the Common Council in which it originated, an Ordinance entitled "An Ordinance to close the portion of an alley extending from Shafer Street to Harrison Street, located between Franklin Street and Park Avenue, which was adopted by the Common Council on the 5th day of July, 1910, concurred in by the Board of Aldermen on the 12th day of July, 1910, and presented to me on the 15th day of July, 1910.

There was no recorded vote in either branch of the City Council on the adoption of this ordinance.

As Article 125 of the Constitution, and Section 1033c of the Code 1904, prohibit the City Council from selling any of the rights of the City in and to its streets and public places except by a recorded affirmative vote of three-fourths of all the members elected to each branch of the City Council, I had grave doubts as to whether such rights could be given away in a less formal manner, and by a less

decisive vote. I therefore asked the opinion of the City At-
56 torney on the subject, and copies of my letters to him and of his opinion are herewith enclosed.

By his construction of the law, the learned City Attorney is of opinion that the restrictions mentioned above do not apply in this case, and that an ordinance closing a public alley and allowing two of the owners of the abutting property to occupy and use said alley for their private benefit, for thirty years, or during the pleasure of the City Council was lawfully adopted by a viva voce affirmative vote of a majority of the members of each branch of the City Council.

I acquiesce in this opinion of the legal adviser of the Mayor, and only mention this branch of the subject to emphasise my conviction that if a majority of a bare quorum of both branches of the City Council,—eleven in the Common Council and seven in the Board of Aldermen—can lawfully give away the rights of the City in and to its streets, wharves, parks, etc., then such rights are not properly safeguarded and the law should be amended.

But I cannot give this Ordinance my approval because in my judgment it is opposed to sound public policy.

The streets and public alleys of the City are public easements for all the people, and while the City Council has authority to close a street or public alley, this should only be done when the public interests requires it, and not arbitrarily for the benefit of a few individuals.

The alley which it is proposed shall be partly closed is twenty feet wide, paved with granite, and is part of a th-roughfare from Monroe Park to Harrison Street. It is frequently used by heavy vehicles as required by ordinance in certain cases, and thus saves from wear and injury the parallel streets which are paved with asphalt blocks. To close this alley in the manner proposed will, to a great extent if not entirely, divert this travel and destroy it as a thoroughfare, no one will attempt to maintain that the closing of this alley and the surrender of the rights of the people to its use will be a public benefit. The only consideration for doing so is that it will confer a private benefit upon a few individuals.

The City Council has control of the streets and public alleys, but does not own them. Every citizen has an equal right to every street and public alley.

The members of the City Council are the guardians of
57 these rights and should not surrender them except for the public good.

Very respectfully,

D. C. RICHARDSON, *Mayor.*

And at another day, to-wit:

At a Court of Chancery for the City of Richmond Held at the Court-room Thereof, in the City Hall in said City, the 12th Day of August, 1910. In Vacation.

N. W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, and CHANNING M. BOLTON, Complainants,

v.

ELIZABETH S. SCOTT, FRED W. SCOTT, E. T. D. MYERS, JR., and THE CITY OF RICHMOND, a Municipal Corporation, Defendants.

This day came the complainants, N. W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton by their attorneys, in the vacation of this Court, and presented their bill of complaint with the exhibits therewith, duly verified by the affidavit of N. W. Bowe, praying for an injunction enjoining and restraining the defendants, Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and the City of Richmond, their agents, servants and employees from closing any portion of the public alley running between Shafer Street and Harrison Street south of Franklin Street and parallel therewith, in the City of Richmond, in the bill mentioned, so as to obstruct the free passage of the complainants and the public through the said alley.

And upon the reading of the said bill of complaint and the exhibits filed therewith, the Court is of the opinion that the complainants are entitled to a temporary injunction in accordance with the prayer of their bill, and doth so adjudge, order and decree. The Court doth further adjudge, order and decree that an injunction be, and the same is hereby awarded in vacation of this Court, enjoining and restraining the said Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and the City of Richmond, a municipal corporation, their agents, servants and employees, from closing any por-
58 tion of the said public alley running between Shafer Street and Harrison Street south of Franklin Street and parallel therewith, in the City of Richmond, so as to obstruct the free passage of the complainants and the public through the said alley, until the further order of this Court. The injunction hereby awarded shall be effective until the 2nd day of the October term, 1910, of this Court, unless dissolved or enlarged before that day.

The Court doth further adjudge, order and decree that the complainants shall not have the benefit of the injunction hereby awarded until they, or some one for them, shall execute a bond before the Clerk of this Court with surety to be approved by him in the penalty of Five Hundred Dollars, conditioned to pay all costs and damages incurred in case this injunction shall be dissolved.

DANIEL GRINNAN, *Judge*.

AUGUST 12, 1910.

To Charles O. Saville, Clerk of the Chancery Court of the City of Richmond:

Separate Demurrer of Elizabeth S. Scott and Grounds Thereof, Filed in Court under Decree of December 21, 1910.

VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE et als.
v.
ELIZABETH S. SCOTT et als.

The said Elizabeth S. Scott, one of the defendants in the above styled cause, demurs to the bill therein and for cause of demurrer saith the same is not sufficient in law, because

1. The alleged rights of the several complainants, sought to be enforced or protected in and by the said bill, are separate, independent, individual, and distinct:

59 2. Because there is a misjoinder of parties complainant, and also a misjoinder of alleged causes of action, in said bill:

3. Because the said bill does not show such right or interest in, or injury or damage to, the complainants as entitle them to institute or maintain this suit, or as authorizes any relief at their instance:

4. Because the said bill states no cause of action in the complainants:

5. Because, if the complainants are entitled to any relief, there is an adequate remedy at law:

6. Because the said bill fails to show that any rights of the complainants have been, or are threatened to be, invaded:

7. Because the said bill fails to show that the complainants are entitled to the relief therein prayed, or any relief in equity:

BRAXTON & EGGLESTON,
PAGE & LEARY,
For Demurrant.

December 20, 1910.

Motion of Elizabeth S. Scott to Abate the Suit as to City of Richmond and Fred W. Scott. Filed in Court under Decree of December 21, 1910.

VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE et als.,
v.
ELIZABETH S. SCOTT et als.

The said defendant, Elizabeth S. Scott, without waiving her demurrer hereinbefore filed, but insisting thereon, moves the Court to abate the said suit as to the City of Richmond and Fred W. Scott, who are improperly joined with the other defendants in said suit, and to proceed against the other defendants as if such mis-
60 joinder had not been made.

BRAXTON & EGGLESTON,
PAGE & LEARY,
For the Defendant, Elizabeth S. Scott.

December 20, 1910.

Separate Demurrer of Fred W. Scott and Grounds Thereof. Filed in Court under Decree of December 21, 1910.

VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE et als.,
v.
ELIZABETH S. SCOTT et als.

The said Fred W. Scott, one of the defendants in the above styled cause, demurs to the bill therein and for cause of demurrer saith the same is not sufficient in law, because 1. The said bill sets forth no cause of action against the said Demurrant, Fred W. Scott, and fails to show that the complainants, or any of them, are entitled to any relief against the said Demurrant, Fred W. Scott.

2. Because the alleged rights of the several complainants, sought to be enforced or protected in and by said bill, are separate, independent, individual, and distinct:

3. Because there is a misjoinder of parties complainant, and also a misjoinder of alleged causes of action, in said bill:

4. Because the said bill does not show such right or interest in, or injury or damage to, the complainants as entitles them to institute or maintain this suit, or as authorizes any relief at their instance:

5. Because the said bill states no cause of action in the com-
61 plainants:

6. Because, if the complainants are entitled to any relief, there is an adequate remedy at law:

7. Because the said bill fails to show that any rights of the complainants have been, or are threatened to be, invaded:

8. Because the said bill fails to show that the complainants are entitled to the relief therein prayed, or any relief in equity:

BRAXTON & EGGLESTON,
PAGE & LEARY,
For Demurrant.

December 20, 1910.

Motion of Fred W. Scott to Abate the Suit as to the City of Richmond. Filed in Court under Decree of December 21, 1910.

VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE et als.
v.
ELIZABETH S. SCOTT et als.

The said defendant, Fred W. Scott, without waiving his demurrer hereinbefore filed, but insisting thereon, moves the Court to abate the said suit as to the City of Richmond, which is improperly joined with the other defendants in said suit, and to proceed against the other defendants as if such misjoinder had not been made.

BRAXTON & EGGLESTON,
PAGE & LEARY,
For the Defendant, Fred W. Scott.

December 20, 1910.

62 *Separate Demurrer of E. T. D. Myers, Jr., and Grounds Thereof. Filed in Court under Decree of December* 21, 1910.

VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE et als.
v.
ELIZABETH S. SCOTT et als.

The said E. T. D. Myers, Jr., one of the defendants in the above styled cause, demurs to the bill therein and for cause of demurrer saith the same is not sufficient in law, because

1. The alleged rights of the several complainants, sought to be enforced or protected in and by said bill, are separate, independent, individual, and distinct:

2. Because there is a misjoinder of parties complainant, and also a misjoinder of alleged causes of action, in said bill:

3. Because the said bill does not show right or interest in, or injury or damage to, the complainants as entitle them to institute or maintain this suit, or as authorizes any relief at their instance:

4. Because the said bill states no cause of action in the complainants:

5. Because, if the complainants are entitled to any relief, there is an adequate remedy at law:

6. Because the said bill fails to show that any rights of the complainants have been, or are threatened to be, invaded:

7. Because the said bill fails to show that the complainants are entitled to the relief therein prayed, or any relief in equity.

LEAKE & BUFORD,
For Demurrant.

December 20, 1910.

63 *Motion of E. T. D. Myers, Jr., to Abate the Suit as to City of Richmond and Fred W. Scott. Filed in Court under Decree of December* 21, 1910.

VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE et als.
v.
ELIZABETH S. SCOTT et als.

The said defendant, E. T. D. Myers, Jr., without waiving his demurrer hereinbefore filed, but insisting thereon, moves the Court to abate the said suit as to the City of Richmond and Fred W. Scott, who are improperly joined with the other defendants in said suit, and to proceed against the other defendants as if such misjoinder had not been made.

LEAKE & BUFORD,
For the Defendant, E. T. D. Myers, Jr.

December 20, 1910.

The Separate Demurrer of the City of Richmond and Grounds Thereof. Filed in Court Under Decree of December 21, 1910.

VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE et als., Complainants,
v.
ELIZABETH S. SCOTT et als., Defendants.

The said City of Richmond, one of the defendants in the above styled cause demurs to the bill therein, and for cause of demurrer says that the same is not sufficient in law, and the said demurrant assigns the following as the ground of its demurrer:

64 The said bill sets forth no cause of action against the said demurrant the City of Richmond, and fails to show that the complainants or any one of them are entitled to any relief against the demurrant, the City of Richmond.

H. R. POLLARD,
City Attorney, p. d.

And at another day, to-wit:

At a Court of Chancery for the City of Richmond, Continued by Adjournment and Held at the Court-room Thereof, in the City Hall, in said City, on the 21st Day of December, 1910.

VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE et als., Plaintiffs,
v.
ELIZABETH S. SCOTT et als., Defendants.

This day came Elizabeth S. Scott and, on her motion, she is granted leave to file her separate demurrer to the bill — complaint and also her motion to abate this suit as to certain of the defendants, to-wit: Fred W. Scott and the City of Richmond; and likewise came Fred W. Scott and, on his motion, he is granted leave to file his separate demurrer to the bill of complaint, and also his motion to abate this suit as to one of the defendants, to-wit: the City of Richmond; and came also E. T. D. Myers, Jr., and, on his motion, he is granted leave to file his separate demurrer to the bill of complaint, and also his motion to abate this suit as to certain of the defendants, to-wit, Fred W. Scott and City of Richmond; and came also the City of Richmond, and, on its motion, it is granted leave to file its separate demurrer to the bill of complaint. And, thereupon, all of the aforesaid papers were accordingly forthwith filed.

Memorandum by the Court.

Filed in Court Under Decree of March 6, 1911.

Submitted January 17, 1911.

65 In the Chancery Court of the City of Richmond.

N. W. BOWE et als.
v.
ELIZABETH S. SCOTT et als.

Upon the Demurrers to the Bill.

The separate demurrers of Frederick W. Scott and the City of Richmond may be passed upon at the same time, as they rest upon the same point. The bill makes no pretence of allegation that either of these defendants threatens to do the plaintiffs any injury; it does not attempt to state any kind of a case against them. These defendants should not have been made parties and this was conceded in the oral argument. Of course these demurrers are sustained.

Another ground of demurrer, and which is presented by the defendants who remain in the case, is that there is a misjoinder of plaintiffs and consequently of causes of action. It is stated in support of the demurrer that as to each plaintiff the threatened acts of the defendants constitute a separate trespass or injury, with which no other plaintiff is concerned. I do not regard this ground of demurrer as tenable. The argument used by the Court in Hudson v. Maddison, 12 Simons, 416, and which is also used here, is not generally regarded as sound. The authority of that case was very much shaken, if not wholly overturned, by the case of Murray v. Hay, decided five years later (1845) by Chancellor Walworth, 1 Barb. Ch. 59, which has generally been accepted in this country as stating a more rational procedure. The bill here states a case of an injury done to the owners of several separate tenements: the injury is a common injury to the respective tenements; and I think they may all join in one bill. This is not a case like that reported in Marselis v. Canal Co., 1 N. J. Eq., 31, where the Coal Co., was proceeding to occupy with its works the various lands of separate proprietors before making them compensation and it was held a misjoinder for the persons aggrieved to join in one suit; in that case each failure to make compensation worked a separate and distinct trespass upon each proprietor with which the others had no concern and there was no common injury done to all. See Snyder v. Cabell, 29 W. Va., 48; Bosher v. Land Co., 89 Va. 455; 1 Dan. Ch. Pr. (6th Amd. Ed.) Star—page 303, where I am informed that the
66 ruling in Hudson v. Maddison has been abandoned in England also: 29 Cyc. p. 1237; and High on Injunct. (4th Ed.) Sect. 818. The practice in the Chancery Court of New Jersey is

thought to be somewhat different but I do not regard it so. See Jones v. Rowbotham, 48 N. J. Eq. 311 (19 L. R. A. 663). I shall overrule this ground of demurrer,—reading the bill only for the purposes of this particular point.

The chief ground of demurrer and one that has been very much argued is this: Conceding for the moment that the ordinance of the City of Richmond challenged in the bill is wholly void, yet this is an attempt made by private individuals to enjoin a public nuisance where the complainants do not show that they have suffered any special or peculiar damage. The principle of law here referred to has been before the Courts of other States and of England time and time again and is laid down in High on Injunct. (4th Ed.), Section 762 in these words:

"No principle of the law of injunctions is more clearly established than that private persons, seeking the aid of Equity to restrain a public nuisance, must show some special injury peculiar to themselves, aside from and independent of the general injury to the public. And in the absence of such special and peculiar injury sustained by a private citizen he will be denied an injunction, leaving the public injury to be redressed upon information or other suitable proceedings by the attorney-general in behalf of the public. Even in cases of unquestioned nuisance, if the party complaining shows no special injury to himself different from the common injury to the public, he is not entitled to an injunction." See also sections 763, 816, 817 and 818.

In 29 Cyc. p. 1210 the principle is stated thus: "It is absolutely essential to the right of an individual to relief against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which all the general public share alike, and the difference between the injury to him and the injury to the general public must be one of kind and not merely of degree." See also 5 Pom. Eq. Rem. Sect. 542, where innumerable cases are cited in the notes: and 4 Pom. Jurisp. Sect. 1349.

The same principal has been recognized in Virginia, e. g. in James River, &c., Canal Co. v. Anderson, 12 Leigh 313. Also in
67 W. Va. in the recent case of Fowler v. N. & W. R. R. Co., 69 S. E. R. 811, following other cases decided in that State. This W. Va. case is one where certain persons living on a wagon road that formerly crossed a railroad nearby complained that the company had blocked its use where it crossed the railroad track; but they still had another road along the front of their property. The Court said with reference to the obstruction: "Their property is affected in the same way in which the property of other people in that section of the City (Bluefield) has been affected. * * * The only injury done to their property is the denial of means of crossing the railroad at grade. That same injury has fallen on all other property owners in that section of the City, as well as upon property in other sections. The advantage of that crossing to them might be somewhat greater than to other people because of their proximity to it, but this is a difference in degree only, not in the

nature of the advantage, nor in the detriment ensuing from the denial or loss of that advantage."

I do not understand that the counsel for the plaintiffs deny the general principals I have mentioned; but they do claim that their bill states facts that bring their case within conformity to them.

It may be conceded that persons whose lots of land or tenements abut on the obstructed portion of a highway suffer a special and peculiar injury apart from the public; so do persons to whom is left on account of the obstruction either no access or no reasonably convenient access to their property, so do persons whose trade or business is injured by the obstruction. These cases as well as many other may be mentioned as instances where persons sustain a special injury, greater not in degree only but in its very nature or character, from the loss or inconvenience suffered by the general public. Then there are cases that are on the border land, which would be decided probably one way in Mass. and another way in Ala. But it may be stated as a proposition supported by the best considered cases that mere proximity to the point of obstruction where the complainant's land does not abut on the obstructed part of the highway and he is not injured in his trade or vocation and he still has a reasonably convenient access to his property does not make out a case of special injury, but one differing only in degree from that suffered by other persons in that neighborhood. I think that the bill tested by this rule is open to demurrer. It appears that
68 the alley is a long one, extending midway between Franklin Street and Park Avenue through several blocks of the City from Laurel to Lombardy Street and that it has been used in its entire length to a great extent by persons that live in that part of the town or have occasion to pass that way. The obstruction in the alley according to the bill is a public nuisance.

The allegations in the bill that are said to show special injury are these; that the plaintiffs along with others paved the alley in the block back of their houses, including the obstructed portion at their own expense: That wagons with heavy loads are forbidden to use Franklin Street and Park Avenue and consequently use the alley; that the lots of the plaintiffs abut in the rear on the alley (near to but not on the obstructed part) and that the obstruction cuts off ingress and egress in one direction, leaving the alley open only to Harrison Street, whereby there is no direct access through the alley except from one direction, for market wagons, coal wagons, carriages, etc.: that they cannot pass out to Shafer Street towards the business part of the City along the alley, as they have been wont to do, to their inconvenience: and that the plaintiff's rights in the alley will be impaired or lost and that the value of their property will be thereby lessened. Now it appears from the bill of the plaintiffs and the exhibits that the use of the alley from Shafer Street is closed yet from Harrison Street it is entirely open, and that therefore their access to the rear of their lots while rather more circuitous at times is not very much more so and that they have a reasonably commodious means of reaching their back gates. Their lots front on Franklin Street where there is no obstruction. This injury as well

as any other injury stated in the bill, while it is greater than that sustained by other persons living either at a greater distance from the obstruction on the same block, or on the next block, or at other places, is greater in degree only and not in kind or nature: and I am unable to see that a case of special injury is presented by the bill. The cases and notes reported in 28 L. R. A. (N. S.) 1053, 8 Do. 226 & 3 Do. 1126 touching upon this subject are very full.

I do not think that the plaintiffs have any easements or private rights in the alley: their rights are those of other citizens and no greater. No case of dedication where they have peculiar rights is made out. They have no greater rights in the alley at the
69 obstructed part than proprietors whose lands abut on the alley at Laurel or Lombardy Streets.

In view of the authorities, I am constrained to sustain the demurrer.

DANIEL GRINNAN.

Feb. 17, 1911.

Amended Bill Tendered to the Court and Rejected under Decree of March 6, 1911.

VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE, ANN CLAY CRENSHAW, ELLIS W. PUTNEY and CHANNING M. BOLTON

v.

ELIZABETH S. SCOTT and E. T. D. MYERS, JR.

To the Honorable Daniel Grinnan, Judge of the Chancery Court of the City of Richmond:

Your complainant- N. W. Bowe, Anne Clay Crenshaw, Ellis W. Putney and Channing M. Bolton, respectfully, represent to your honor that they have heretofore filed their original bill of complaint in this cause against Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and the City of Richmond a municipal corporation which said original bill of complaint, the exhibits filed therewith and the proceedings had thereunder reference is hereby expressly made and the same are prayed to be read as fully as if the same were herein particularly set forth. By way of amendment and supplement to the said bill and re-affirming all the averments thereof your complainant- set forth the following matters:

(1) The obstruction in the said alley lies between their residences and the business portion of the City, that the obstruction prevents in case of fire the hose being run directly from Shafer Street, where one of the fire plug- is, to complainants' property and there is no other route except a circuitous one in traversing which valu-
70 able time would be lost, that the hose carriages, engines and ladder trucks could not get quickly to the fire because of said obstruction, that the 16 foot alley which remains open has 4 sharp turns and a ladder truck could not traverse it at all, that no

fire apparatus could traverse it quickly because of its short turns and narrowness, that the fire plugs in the neighborhood of complainants' property are so situated that the proper and only reasonable route of the fire apparatus would be through the Shafer alley from Shafer Street to Harrison Street, that the judgment of the City Engineer is that the said obstruction of the alley adds greatly to the risk of any fire which might break out in complainants' property and complainants aver that such obstruction does add greatly to their risk in case of fire.

(2) Complainants say that the entrance to Shafer alley from Harrison Street is dangerous because of the comparative narrowness of Harrison Street and the fact that — Harrison Street at the point where it meets the said alley there is a doubled tracked street car line, thus making ingress and egress from the alley attended with risk.

(3) Complainants say that the obstruction in the alley renders the alley liable to become dangerous to the health of complainants because with the obstruction the alley is much more difficult to keep clean, and complainants heard it asserted by an agent of the Health Department of the City of Richmond, who appeared before the Street Committee, when it was considering the question of closing this alley, such would be the fact, and for that reason protested closing the said alley.

(4) Complainants say that the 16 foot alley in the midst of the block is four feet narrower than the Shafer alley and that it has obstructions therein consisting of a large tree, large telephone poles and projecting manure boxes. A large automobile could not safely traverse said alley.

(5) Complainants say that if said obstruction is permitted to remain in said alley that their said property will be depreciated in value.

(6) Complainants aver that they were influenced in pur-
71 chasing their several properties by reason of the fact of the existence of an open alley from Harrison to Shafer.

By reason of the said facts complainants aver that they suffer from said obstruction an injury which is not only greater in degree but different in kind from any injury suffered by the general public because of said obstruction.

In tender consideration whereof and forasmuch as your complainants are remediless save in a Court of Equity, your complainants prays that Elizabeth S. Scott, E. T. D. Myers, Jr., and the City of Richmond a municipal corporation may be made parties defendant to this amended and supplemented bill and be required to answer the same but answers under oath are expressly waived and that the said ordinance of the City of Richmond be declared null and void, that an injunction enjoining and restraining the said Elizabeth S. Scott, E. T. D. Myers, Jr., and the City of Richmond their agents, servants and employees from closing any portion of the said alley running between Shafer Street and Harrison Street south of Franklin Street and parallel therewith in said City so as to obstruct the free passage of your complainants and the public

through the said alley, that the said Elizabeth S. Scott and E. T. D. Myers, Jr., their servants and employees be restrained and enjoined from exercising any rights or privileges under the said void ordinance, that proper process may issue and that your complainants may have such other further and general relief as the nature of this case may require or to equity may seem meet.

And your complainants will ever pray, etc.

N. W. BOWE,
ANN CLAY CRENSHAW,
ELLIE W. PUTNEY, AND
CHANNING M. BOLTON,
By COUNSEL.

DAVID MEADE WHITE,
RICHARD EVELYN BYRD, *P. Q.*

STATE OF VIRGINIA,
City of Richmond, To wit:

72 I, N. W. Bowe, Jr., a Notary Public for the City aforesaid in the State of Virginia, do certify that N. W. Bowe personally appeared before me in the City aforesaid and made oath that the statements contained in the foregoing bill so far as made on his own knowledge are true and so far as made on the information derived from others he believes them to be true.

Given under my hand this 21st day of February, 1911.

N. W. BOWE, JR., *N P.*.

My commission expires on the 14th day of Feb'y, 1915.

Memorandum by the Court Filed in Court under Decree of March 6, 1911.

In the Chancery Court of the City of Richmond.

N. W. BOWE et al.
v.
ELIZABETH S. SCOTT et al.

In pursuance of notice given three or four days before February 24, 1911, the plaintiffs' counsel appeared in Court on that day and moved for leave to file their amended bill, which they then tendered to the Court. Counsel for the defendants, Mrs. Scott and Mr. Myers, appearing in opposition to the motion, contended that leave to file the amended bill should be refused upon the ground that the Court had already announced its decision to sustain the demurrer to the whole bill upon a material ground and that no excuse was shown why the new matter contained in the amended bill had not been brought forward before the argument was had upon the demurrer; and they say that, if the new matter was not previously known to the plaintiffs, they should have known of it.

Whether or not the motion to reject the amended bill should prevail must be determined by the established rules of chancery practise under all the circumstances of the case.

The injunction was granted the plaintiffs on August 12, 1910; and so any special injury to the plaintiffs from the closing of the alley in the rear of their residences was a matter which by that time had received from them considerable attention. By previous
73 arrangement the demurrers to the bill were set down to be argued on December 20, 1910, and were argued on the 20th and 21st days of that month. The demurrers were actually filed on the 21st of December by an order of that date. The Court having taken under advisement the matters argued, by agreement of counsel written arguments on the demurrers were to be furnished to the Court and this was done by the 17th of January, 1911. In the arguments, oral and written, the allegations of the bill were examined with great minuteness and what were supposed to be deficiencies in the bill were pointed out. On February 17, 1911, the Court announced its decision to sustain the demurrers upon a ground that went to the whole bill; but no order to that effect has yet been entered. When counsel for the defendant, Mrs. Scott and Mr. Myers, appeared in Court with a sketch for an order to carry into effect the Court's decision, the plaintiffs' counsel stated that they would offer within a very few days an amended bill, which they have done.

The position of the plaintiffs is that an opportunity should now be given them to present to the Court by their amended bill additional circumstances, of a nature somewhat similar to those mentioned in the bill, which they say will make out for them a case of special and peculiar injury, arising from the closing of the alley, apart from that sustained by the public. When the amended bill is examined, it will be seen that all the new matter stated in it was either known to the plaintiffs or might well have been known to them, prior to the argument of the demurrer, if not at the time the bill was prepared. The question arises why, if they considered this new matter material to their case, they did not bring it forward two or three months ago or earlier. No reason is given for their not having done so. They might doubtless have obtained leave to amend their bill at any time between October 3rd and December 20, 1910, for the Court was in session all that time. They would probably have been given leave to amend during the argument on December 20th and 21st. The plaintiffs were intimately acquainted with the alley and had the most ample opportunity to discover all the elements of the damage they would receive from closing it. Nearly two months after the demurrers were argued orally, the Court announced its decision and it is only after that time that the amended bill is offered; and no reason for the delay is stated.
74 Under such circumstances the motion for leave to file an amended bill comes too late, according to the settled rules of chancery practise. When the proceedings in a cause have reached the stage that they have reached in this suit, a motion for leave to file an amended bill is received with reluctance and not granted but for some good reason. If such an innovation as is here desired were to be granted, it would open a precedent whereby suits might be greatly and unnecessarily prolonged to the inconvenience, delay, and expense of litigants; instead of a plaintiff being at pains to state his whole case in his bill, as he ought to do, if possible, he would

be at liberty to present his case to the Court by piece-meal; and the announcement of the Court's decision would serve no other purpose than to give notice that the bill needed additional allegations. While the Courts are liberal in allowing amendments, the indulgence has never gone to this extent. It is said and said correctly that Courts have discretion in these matters, but this discretion is in no sense an arbitrary or capricious one: it is a discretion that is at all times hedged about and governed by those rules that have long been established and recognized as binding upon the Courts. See on the general subject, Jackson v. Valley T. & L. Co., 108 Va. 722 and cases there cited.

For these reasons leave to file the amended bill must be denied.

DANIEL GRINNAN.

March 4, 1911.

NOTE.—I wish to correct the statement made in my Memo. of February 17, 1911, to the effect that the plaintiffs' counsel conceded that the demurrer of the City of Richmond should be sustained. They inform me that I am in error in so saying.

D. G.

March 4, 1911.

And at another day, to-wit:

At a Court of Chancery for the City of Richmond, Continued by Adjournment and Held at the Court-room thereof, in the City Hall, in said City, on the 6th Day of March, 1911.

75 VIRGINIA:

In the Chancery Court of the City of Richmond.

N. W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, and CHANNING M. BOLTON, Plaintiffs,

v

FRED W. SCOTT, ELIZABETH S. SCOTT, E. T. D. MYERS, JR., and CITY OF RICHMOND, Defendants.

In Chancery.

The subpœna heretofore awarded in this cause having been duly executed upon all of the defendants, this cause—having been regularly matured at rules and set for hearing as to each and every defendant—came on to be heard, on December 21, 1910, upon the said subpœna (returned duly executed as aforesaid), upon the bill of the Plaintiffs and exhibits therewith, upon the preliminary injunction order hereinbefore entered, and now in force (the same having been permitted to remain in force until now by agreement of parties, without prejudice), upon the separate motions of the said defendants Elizabeth S. Scott and E. T. D. Myers, Jr., to abate the suit as to the City of Richmond and Fred W. Scott, upon the separate motion of Fred W. Scott to abate the suit as to the City of Richmond, upon the

separate demurrers to the Plaintiffs' Bill of Fred W. Scott, Elizabeth S. Scott, the City of Richmond, and E. T. D. Myers, Jr.,—which said several motions and separate demurrers had been theretofore filed in this cause by leave of Court, and each of which said several demurrers had been set down for argument on motion of the respective demurrers therein: And was argued by counsel.

On consideration whereof, the Court (having taken time to consider of its judgment) was, and is, of opinion—for reasons stated in writing dated February 17, 1911, and filed with the record in this cause, and now and hereby made a part thereof—that each and every of the said separate demurrers to the bill in this cause should be sustained, which said opinion and judgment the Court formally announced in this cause on February 17, 1911: whereupon, and after the announcing by the Court of its said judgment and opinion, the said Plaintiffs, by counsel, appeared and moved the Court for
76 leave to file their Amended Bill which they then and there tendered to the Court, and, the said defendants objecting to the filing of the said Amended Bill, the said last named motion was then argued by counsel and the Court took time to consider of its judgment thereon; and now, on this 6th day of March, 1911, the Court, having maturely considered of its judgment in the premises, is of opinion (for reasons stated in writing, dated March 4, 1911, and filed with the record in this cause, and now and hereby made a part thereof) that the said motion of the Plaintiffs to file their said Amended Bill should be rejected:

And it appearing to the Court that the objects of each of the several separate Motions of the Defendants, Elizabeth S. Scott, Fred W. Scott, and E. T. D. Myers, Jr., hereinbefore referred to, are fully accomplished by the sustaining of the said several separate Demurrers, as is hereinafter done, the Court deems it unnecessary to act upon the said separate motions of said Elizabeth S. Scott, Fred W. Scott and E. T. D. Myers, Jr.

Therefore it is now adjudged, ordered, and decreed as follows:

First. That each and every of the said demurrers to the Plaintiffs' Bill be, and the same is hereby, sustained upon the grounds stated in the aforesaid opinion of the Court:

Second. That the said motion of the Plaintiffs to file their said amended bill in this cause is hereby rejected, and leave to file said amended bill is hereby refused:

Third. That the said original bill be, and the same is hereby, dismissed as to each and every of the defendants thereto:

Fourth. That the said defendants recover of the said Plaintiffs herein, jointly and severally, their legally taxable costs in this cause expended:

Fifth. That the injunction heretofore awarded be, and the same is hereby, dissolved, and

Sixth. That this cause be dismissed and stricken from the docket.

And the complainants having signified their intention to present a petition to the Supreme Court of Appeals of Virginia for an appeal from this final decree, it is ordered that this decree be, and
77 the same is hereby, suspended for a period of sixty (60) days, in order to allow the complainants to present their petition to

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the said Supreme Court of Appeals of Virginia, provided that the said complainants, or some one for them, shall (within five days from this date) execute before the Clerk of this Court, a bond (with security to be approved by the said Clerk) in the penalty of Five Hundred Dollars ($500.00), conditioned for the payment of all such damages as may accrue by reason of the suspension of this decree.

I, Charles O. Saville, Clerk of the Chancery Court of the City of Richmond, hereby certify that the foregoing is a true transcript of the record in the above styled suit, as was ordered by counsel, and that notice in obedience to Section 3457, Code of Virginia, has been duly given.

CHAS. O. SAVILLE, *Clerk*.

Fee for transcript of record $20.00.

A Copy—Teste:

H. STEWART JONES, *C. C.*

(Here follows diagram marked p. 78.)

79 Keith, P., and Cardwell, J., absent.

WHITTLE, *J.*:

The principal question presented by this appeal involves the right of individuals (owning real estate in the city of Richmond, but whose lots do not abut on the section of the public alley obstructed, and who have not suffered any peculiar damage therefrom,) to have declared null and void a city ordinance authorizing the closing, for the period of thirty years, of a public alley reaching from Shafer street to Harrison street, to the extent to which it bisects the respective lots of the appellants, Elizabeth S. Scott and E. T. D. Myers, Jr. Also to injoin the defendants from closing any portion of the alley, or from exercising any rights under "the void ordinance."

From a decree sustaining demurrers to the original bill, overruling the motion of the plaintiffs to file an amended bill and dissolving the injunction theretofore awarded and dismissing the bill, this appeal was granted.

Speaking generally the obstruction of a public highway is a public nuisance, and the trend of authority is, that an individual cannot maintain a bill to injoin such nuisance unless he can show that he has suffered or will suffer therefrom special and peculiar injury or damage to himself as distinguished from injury or damage to the general public. Moreover, such special and peculiar injury or damage must be direct and not purely consequential, and must be different in kind and not merely in degree from that sustained by the community at large.

The foregoing statement of the rule denotes the line of cleavage between remedies for public nuisances which may be maintained by an individual and such as must be asserted for or on behalf of the public.

The rule is thus stated in 29 Cyc. 1210: "It is absolutely essential to the right of an individual to relief against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which all the general public share alike, and the difference between the injury to him and the injury to the general public must be one of kind and not merely of degree." 4 Pom. Eq. Jur., sec. 1349; 5 Pom. Eq. Rem., sec. 542, where numerous cases are cited.

The research of counsel has drawn our attention to decisions which show that the statement of the law as given in Cyc. prevails in England and generally throughout the United States. It is also the established doctrine in Virginia. Beverage v. Lacey, 24 Va. 63; Com'th v. Webb, 27 Va. 729; James River & K. Co. v. Anderson, 39 Va. 278; Richmond Trust Co. v. Murphy, 98 Va. 109; Fisher v. S. A. L. Ry., 102 Va. 369; Brown v. Baldwin, 112 Va., 5 Va. App., 432.

In James River & K. Co. v. Anderson, supra, at p. 213, Tucker, P., observes: "The property of the plaintiff, Anderson, lies in
80 another square to the eastward, and that of Mills two squares off. As well might a lot owner at Rocketts complain of the narrowing of the main street on Shockoe hill, and bring his private action or bill for an injunction. Such remote injuries common to

the whole population are to be remedied by the action of the constituted corporate authorities, or by prosecution for a nuisance. If Anderson and Mills can implead the defendants for narrowing a street not contiguous to their property, every man in the community might do so. To prevent this evil, the law forbids an action by a private individual for a common nuisance, unless he can show a special injury." At p. 307, Judge Tucker, on the question of jurisdiction, remarks: "In whatever light I have been enabled to view this case, I am perfectly satisfied that the injunction never should have been granted, and that upon the hearing it should have been altogether dissolved."

The learned chancellor, in a clear and conclusive opinion, shows that though the injury to the plaintiffs, as stated in the bill, may be greater than that sustained by other persons living more remote from the scene of the obstruction, such injury is nevertheless greater in degree only and not in kind.

Therefore, under the authorities, the bill does not state a case of such special injury as would entitle the plaintiffs to an injunction.

After the court had announced its decision sustaining the demurrer to the bill upon a ground involving its dismissal, plaintiffs' counsel stated that they would offer within very few days an amended bill. The chancellor found that the matters of amendment (which were of a nature somewhat similar to those contained in the original bill) were either known to the plaintiffs, or might well have been known to them prior to the argument of the demurrer; and held that the motion to file the amended bill came too late.

In this ruling we think there was no error. Judge Grinnan, in that connection, justly remarks: "When the proceedings in a cause have reached the stage that they have reached in this suit, a motion to file an amended bill is received with reluctance and not granted but for some good reason. If such an innovation as is here desired were to be granted, it would open a precedent whereby suits might be greatly and unnecessarily prolonged to the inconvenience, delay and expense of litigants; instead of a plaintiff being at pains to state his whole case in his bill, as he ought to do if possible, he would be at liberty to present his case to the court by piecemeal; and the announcement of the court's decision would serve no other purpose than to give notice that the bill needed additional allegations. While the courts are liberal in allowing amendments, the indulgence has never gone to this extent. * * * Courts have discretion in these matters, but this discretion is in no sense an arbitrary or capricious one; it is a discretion that is at all times hedged about and governed by those rules that have long been established and recognized as binding upon the courts."

The action of the court in overruling the motion for leave to file the amended bill is well sustained by authority. 1 Bar. Chy. Pr. 324, 327; Alsop v. Catlett, 97 Va. 364; Vashon v. Barrett, 99 Va. 346; Jackson v. Valley Tie Co., 108 Va. 714, 722, 2 Va. App.

Concurring, as we do, in the ruling of the court sustaining the demurrer to the bill, it becomes unnecessary, and would, indeed, be improper, to express any opinion with respect to the validity of the

ordinance, or the right of the public to redress the alleged invasion of their prerogative by prosecution, or other appropriate remedy, for a common nuisance.

The decree appealed from is without error and must be affirmed. Affirmed.

81 VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals, at the Library Building, in the City of Richmond, on Monday, the 24th Day of June, 1912.

The following copy of an order of this court, entered at its place of session at Wytheville was this day received by the clerk here:

"VIRGINIA:

In the Supreme Court of Appeals, Held at the Court-house of Wythe County, in the Town of Wytheville, on Thursday, the 13th Day of June, 1912.

N. W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, and CHANNING M. BOLTON, Appellants,

against

ELIZABETH S. SCOTT, FRED W. SCOTT, E. T. D. MYERS, Jr., and the CITY OF RICHMOND, a Municipal Corporation, Appellees.

Upon an Appeal from and Supersedeas to a Decree Pronounced by the Chancery Court of the City of Richmond, on the 6th Day of March, 1911.

This cause, which is pending in this Court at its place of session at Richmond, having been fully heard but not determined at said place of session; this day came here the parties, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree complained of. It is therefore considered that the same be affirmed and that the appellees recover of the appellants thirty dollars damages and also their costs by them about their defense herein expended.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Richmond, who will enter this order in the order book there and certify it to the said Chancery Court.

Appellees' costs at Wytheville $1.77.

A copy. Teste:

J. M. KELLY, *C. C.*"

Teste:

H. STEWART JONES, *C. C.*

A copy. Teste:

H. STEWART JONES, *C. C.*

82 In the Supreme Court of Appeals of Virginia, at Richmond.

N. W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, Appellants,
versus
Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and the City of Richmond, a Municipal Corporation, Appellees.

Application for Rehearing.

Richard Evelyn Byrd and David Meade White, Attorneys for Petitioners.

Filed Sep. 6, 1912. A. W. May, Clerk.

82¹ In the Supreme Court of Appeals of Virginia, at Richmond.

N. W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, Appellants,
versus
Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and the City of Richmond, a Municipal Corporation, Appellees.

Application for Rehearing.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

N. W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Belton, the plaintiffs in error, respectfully apply for a rehearing of this cause, which was decided by this honorable court on the 13th day of June, 1912, at Wytheville, adversely to the plaintiffs in error.

The following reasons are submitted why this Honorable Court should entertain an application for a rehearing of this cause:

First. This court, in its opinion, says: "The principal question presented by this appeal involves the right of individuals (owning real estate in the City of Richmond, but whose lots do not abut on the section of the public alley obstructed) to have declared
82¹ null and void a city ordinance authorizing the closing for a period of thirty years, of a public alley reaching from Shafer street to Harrison street, to the extent to which it bisects the respective lots of the appellants, Elizabeth S. Scott and E. T. D. Myers, Jr. Also to enjoin the defendants from closing any portion of the alley, or from exercising any rights under 'the void ordinance.'" Continuing, the Court says: "Speaking generally the obstruction of a public highway is a public nuisance, and the trend of authority is, that an individual cannot maintain a bill to injoin such nuisance unless he can show that he has suffered or will suffer therefrom special and peculiar injury or damage to himself as distinguished from injury or damage to the general public. Moreover, such special and peculiar injury or damage must be direct and not purely conse-

quental, and must be different in kind and not merely in degree from that sustained by the community at large."

We submit that while it may be true, as a general rule, that individuals cannot maintain a bill to enjoin a public nuisance unless they can show that they have suffered or will suffer therefrom special and peculiar injury, still we respectfully insist that under the Constitution of Virginia, the plaintiffs in error did make and state a case for an injunction. Whatever might have been the law in this state prior to our present Constitution, the Convention which framed the Constitution of 1902 changed the old law when it ordained: "It (the legislature) shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation."

Now, one of the grounds upon which the ordinance was attacked was as follows: "That the ordinance is an attempt to take from your complainants, whose property adjoins and abuts upon the said alley, their rights in and to the said alley without due process of law." The question arises, therefore, did the complainants have any rights in and to the alley, and if so, were those rights property rights protected by the Constitution of Virginia as well as the Constitution of the United States. We submit the plaintiffs in error did have such rights and they have been denied the protection guaranteed
82[3] by the Constitution of Virginia and the Fourteenth Amendment to the Constitution of the United States, which prohibits a state from depriving any person of property without due process of law.

That the Convention that framed the Constitution of 1902 intended to protect the rights of the individual in the enjoyment of some public right which the individual was entitled to make use of in connection with his property is manifest from the Debates in the Convention on the amendment. We quote, in part, from the debates.

Mr. Westcott, a member of the Convention, in the course of his argument for the amendment, said:

"But before I pass from the City of Richmond, let me call your attention Mr. Chairman and gentlemen of the Committee, to another case which arose a few years ago in this city. A man by the name of Meyer purchased and improved and occupied by himself and by tenants for years property fronting on Eighth street, between Canal and Cary, in the City of Richmond. I wish distinctly to disclaim any design to reflect upon the wisdom or the righteousness of the action of the City Council of the City of Richmond in passing the ordinance. I am well satisfied, from what I know of such municipal matters, that the facts and circumstances in so far as the public necessity for what they did existed to the fullest extent. But let us see the operation in that instance of this beautiful rule which the gentleman would have eternally and perpetually fastened upon us.

"There was, as I said, a man by the name of Meyer owning property upon Eighth street. The city council, at the behest of the great Chesapeake and Ohio Railway Company, did what? It did not change the grade. It was not one of those extreme cases that the gentleman from Roanoke, in his ingenuity, suggested upon this com-

mittee. There was unquestionably no possible foresight with the lack of which that unfortunate citizen could be charged.

"He built upon the two lots a brick building, stores below and family residences above. The city vacated sixty feet of Eighth street, beginning at the line of Canal street, and the railroad company was authorized under that ordinance to construct a bridge for foot passengers over the sixty feet of vacated ground, and the railroad company had surrendered to it absolutely for every purpose the sixty feet of vacated street. *Now, this man's property was in the same*
82[4] *block. He was not an abutting property owner upon the portion of the vacated street.* (Italics ours.) When the railroad company besought the city council to pass the ordinance, the city council did what? The city council in its wisdom, recognizing, doubtless, the necessity, in the interest of the public, that that portion of Eighth street should be vacated, and knowing the damaging extent to which it would affect property owners upon that square, demanded, exacted and received of that great railroad corporation an indemnifying bond to save the city harmless from all loss or damage which it might sustain by reason of the passage of the ordinance, the vacation of that street to the railroad company, and in suits that might arise upon it.

"Mr. Meyer and several others instituted suits against the city and Chesapeake and Ohio Railroad Company to recover damages, though Mr. Meyer was the on-y one who carried his case from the Supreme Court of Appeals of Virginia to the United States Supreme Court. There he was met with the same uniform result attained in all such cases in Virginia, of damnum absque injuria. * * *

"Now, then, if the provision which we propose to insert in the new Constitution of Virginia had existed at that time the gentlemen representing this wealthy corporation would have been confronted with the provision that not only shall private property not be taken, but it shall not be damaged for public uses without just compensation, and whatsoever the damage that individual had received by reason of that corporate act, over and above the damage which others of the community generally experienced by reason of it, he would have been entitled to, and could have enforced his demand for. * * *

"If we adopt the provision which the majority of the committee will ask you to adopt, then we have an unbroken line of construction by no less than seventeen states of the Union on that question, led by the great State of Illinois, several of whose cases have gone to the Supreme Court of the United States. That is not all. There is no maze or difficulty in which we involve either the state or the jurisprudence of the state.

"I wish to say further that the great State of Illinois has had no less than two cases, to-wit, Rigney vs. Chicago, and Taylor vs. Chicago, which have been taken up to the Supreme Court of the United States, and the exact meaning and intent and scope and effect of the words 'or damaged' have been passed upon not only by the Supreme Court of the State of Illinois, but by the Supreme Court of the United States, and the construction of the Supreme Court of Illinois
82[5] has been expressly adopted in the case of Rigney vs. Chicago. Debates, Vol. 1, p. 703.

Mr. Carter, against the amendment, said:

"I think there ought to be a change in the law which now prevails and which has prevailed in this Commonwealth. I think there are many cases of injustice that have arisen and will continue to arise, unless the law is changed. I agree with the gentleman from Accomac that the case he cited from Charlottesville is one of those cases. I agree with the gentleman from Accomac that the case he cited from the City of Richmond, which went to the Court of Appeals of Virginia, and from there to the Supreme Court of the United States is another case where injustice was done by reason of the present law."

Judge Ingram, who introduced the original resolution into the Convention, spoke in part, as follows:

"But I do insist, Mr. Chairman, that these gentlemen who so far have argued this case, who have cited always cases in which cities were involved, should bear in mind that in each of these cases where this fearful hardship was worked at the expense of individuals in the community, it was done for the benefit of two quasi public corporations, the Norfolk and Western in the one case, and the Chesapeake and Ohio in the other. I allude to the case of the Home Building Fund Company against Roanoke, where they destroyed the individual's property by building approaches to certain bridges over the tracks of the *of the* Norfolk and Western Railroad Company. I allude to the case of Meyer against the City of Richmond, where they shut up one of the streets of this city, practically, by an overhead bridge, and destroyed the property of the citizen for the benefit of the Chesapeake and Ohio Railroad Co., and so astute was the City's attorney that he took a bond of indemnity from the Chesapeake and Ohio Railroad Company to save the City harmless."

Speaking of the word "damaged" Judge Ingram said:

"It may now be regarded as settled that they include any damage to property produced by an interference with a right, either public or private, which the owner or occupier is entitled to make use of in connection with the property, and the loss or impairment of which renders the property less valuable." Debates, vol. 1, page-715-716.

82[6] Mr. R. Walton Moore said:

"All we propose to say now is (not attacking any corporation, whether municipal corporation or internal improvement company) that you shall not injure, you shall not materially damage, you shall not permanently diminish the value of an individual's property for any purpose without making due compensation to him. That is all we propose."

Mr. Meredith said:

"Mr. Chairman, I cannot expect to add much to the discussion that has taken place on this question, because it has been so fully and ably discussed on both sides, but I take such an interest in the matter, because I have seen so much gross injustice done under the provision of the present Constitution, that I do not feel that I should like the occasion to pass by without adding a few words in support of the proposition of the committee, asking that the Con-

stitution be so changed that this continued injustice shall not be prolonged. * * * I will go to the full extent of the English doctrine that if you actually damage a man, it makes no difference whether he be ten miles or two miles or half a mile off. Upon no principle of equity can you cut him off. It is simply a question of proof, and the difficulty of proof will be on me, and I must bear the burden.

"Will the gentleman from Roanoke undertake to contend that a man who is damaged a quarter of a mile off ought to be paid and a man damaged to the same extent or a greater extent ten miles off should not be paid? That is the simple announcement of the English court. It is a principle of justice, it is a principle based upon common sense and common reason." Debates Constitutional Convention 1902, page 728.

It clearly appears from the debates, on the amendment to the Constitution, that the framers of the Constitution recognized the injustice and hardship of cases like the case of Meyer vs. Richmond, and that it was their intention to change the old law and give the individual protection against a class of wrongs where the old law afforded him none. The framers had in mind the mischief worked under the old law and the amendment was adopted with a view of giving greater security to private rights by affording relief in cases of hardship where it had before been denied. They declared
82 a new rule of civil conduct from which new rights were born and protected. The right to damage to property produced by an interference with a right, either public or private, which the owner or occupier was entitled to make use of in connection with his property and the loss or impairment of which renders the property less valuable was one of the rights created by the new Constitution. Rigney v. Chicago, 102 Ill., p. 64; Tidewater R. Co. v. Shartzer, 107 Va., p. 562.

The appellants set forth in their bill that they had rights in the alley which they were entitled to use, and did use, in connection with their property, and that the loss of that right would damage their property. They, therefore, set forth a case that comes squarely within the protection guaranteed by the Constitution.

Under the present Constitution, it is not necessary that an obstruction should be immediately in front of the individual's lot in order to entitle him to damage. The question is not the point within the protection guaranteed by the Constitution.
with the right begins, but the question is whether such obstruction or destruction of the right produces a damage or impairment which renders the property less valuable. This, therefore, becomes a question of proof. It's a question of proof.

In Meyer vs. City of Richmond et al., 172 U. S., page 374, the facts were as follows: Meyer owned in fee a lot of land fronting on Eighth street, between Cary and Canal streets, on which were located two brick buildings. On the 25th day of June, 1886, the Council of Richmond, by ordinance, authorized the Richmond and Alleghany Railway Company to obstruct for a distance of sixty feet (commencing at Canal street in the direction of Cary street) Eighth

street, and the railroad company obstructed the said street by building a fence across Eighth street, but provided an overhead bridge for foot travelers. The place of obstruction was not in front of Meyer's lot, but appears to have been forty or more feet south of his property. He instituted suit for damages, but under the old Constitution it was held he could not recover. There is no
82[8] difference in the facts in the Meyer case from the facts set up in the case of the appellants. Now, under the old law it was held Meyer could not recover, but we have seen that the Meyer case was cited in the debates on the amendment to the Constitution, and the object was to change the law so as to give the individual a remedy in just such cases. If the Meyer case had arisen under the laws of Illinois, after that State had amended its Constitution by inserting the words "or damaged," he would not have been denied damages for the wrong done.

Mr. Justice McKenna, delivering the opinion of the court, said:

"In Chicago v. Taylor, Taylor sued to recover damages sustained by reason of the construction by the city of a viaduct in the immediate vicinity of his lot. The construction of the viaduct was directed by ordinances of the city council. The facts were: For many years prior to, as well as at, the time this viaduct was built, the lot in question was used as a coal yard, having upon it sheds, machinery, engines, boilers, tracks, and other contrivances required in the business of buying, storing and selling coal. The premises were long so used, and they were peculiarly well adapted for such business. There was evidence before the jury tending to show that, by reason of the construction of the viaduct, the actual market value of the lot, for the purposes for which it was specially adapted, or for any other purpose for which it was likely to be used, was materially diminished, access to it from Eighteenth street being greatly obstructed, and at some points practically cut off; and that, as a necessary result of this work, the use of Lumber street, as a way of approach to the coal yard by its occupants and buyers, and as a way of exit for teams carrying coal from the yard to customers, was seriously impaired. There was also evidence tending to show that one of the results of the construction of the viaduct, and the approaches on either side of it to the bridge over Chicago river was, that the coal yard was often flooded with water running on to it from said approaches, whereby the use of the premises as a place for handling and storing coal was greatly interfered with, and often became wholly impracticable.

"On behalf of the city there was evidence tending to show that the plaintiff did not sustain any real damage, and that the inconveniences to occupants of the premises, resulting from the construction and maintenance of the viaduct, were common to all
82[9] other persons in the vicinity, and could not be the basis of an individual claim for damages against the city.

"There was a verdict and judgment against the city, and this was sustained. The tenor of the decision is, that the damages were consequential, and the difference of the ruling from that in Northern Transportation Co. v. Chicago was explained and based upon a

change in the Constitution of the state of Illinois, which enlarged the prohibition to the damaging as well as to the taking of private property for public use, and its interpretation by the Supreme Court of the state 'that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate; but if the construction and operation of the improvement is the cause of the damage, though consequential, the party may recover.'" See also Rigney v. Chicago, 102 Ill., p. 64.

The framers of the present Constitution adopted the construction of the Supreme Court of Illinois when they adopted the amendment. See Debates Constitutional Convention 1902, p. 704.

In view of the amendment to the Constitution, we submit the cases cited by the court are not authority because the old law was changed by the framers of the Constitution of 1902.

The ordinance of the city of Richmond, complained of, deprives the appellants of their public right, at least, in the alley which they were entitled to make use of, and did make use of, in connection with their property and was a taking of their property, within the meaning of the Constitution, without due process of law. The ordinance was, therefore, null and void, because it was contrary to the Constitution of Virginia, and the Fourteenth Amendment to the Constitution of the United States which prohibits a state from depriving any person of his propery without due process of law.

Second. The appellants show in their bill that the portion of the alley vacated by the ordinance was dedicated by John C. Shafer, who owned the land in fee, as and for a public alley, and that it was accepted by the City of Richmond as and for a public alley. The dedication, therefore, became a contract. The appellants
82½ charge that the ordinance is void because it is in conflict with section 10, Article 1, of the Constitution of the United States, in that it impairs the obligation of the contract between the said John C. Shafer and the City of Richmond.

In Barclay et al. v. Howell's Lessee, 6 Peters, p. 481, the Supreme Court said:

"If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery to compel a specific execution of the trust, by restraining the corporation, or by causing the removal of obstructions. But, even in such a case, the property dedicated would not revert to the original owner. The use would still remain in the public limited only by the conditions imposed in the grant."

In Washburn's Easements and Servitudes, page 241, the writer says:

* * * "Nor could such corporation sell a public square which had been dedicated, or apply it to any other use than that to which such dedication was made. So where a square was dedicated by being laid down as such, on a plat of a town, and individuals built houses around it, it was held that the fee of the land vested in the town, but in trust for the uses for which it was dedicated, and the

town could not lay streets across it or use it for other purposes than a square.

"A question of this kind came up in respect to a public square in Philadelphia, which Penn had dedicated to the City. It was held that, after such dedication, the owner of the soil could not grant away an exclusive right to any part of it. Nor could any length of occupation destroy the right of the public, in the absence of positive statute, short of a strict prescription. * * * When property is dedicated or transferred to public use, the use is indefinite, and may vary according to circumstances. The public being unable themselves to manage or attend to it, the care and employment of it must devolve upon some local authority or body corporate as its guardian, who are in the first place to determine what use of it, from time to time, is best calculated for the public interest, subject, as charitable uses are, to the control of the laws and the courts, in case of any abuse or misapplication of the trust. The corporation has not the right to these squares, so as to be able to sell them, or employ them in any way variant from the object for which they were designed.

82½

But the question will arise, suppose the corporation does make a use of the dedicated property in a way variant from the object for which it was designed, can citizens of the corporation restrain the abuse of the trust by application to a court of equity? If the local authorities violate a trust imposed in whom does the power lie to correct the abuse? "The courts, according to a reputable author," says Mr. Hogg, Hogg's Equity Principles, p. 368, "will enjoin a city assessment made without authority of law, even where no question as to a cloud upon the title has been raised; to prevent an unauthorized or unconstitutional subscription to the stock of a railroad company; to prevent a sale for taxes where the city has not complied with the requirement of a statute; to prevent the unauthorized appropriation of the funds of a city, as for the celebration of the Fourth of July; to prevent the issuing of bonds for a purpose unauthorized by law," and this at the instance of any tax paying resident or voter of such city, suing on behalf of himself and all other tax payers of such city. See Barton Ch. Prac., 449, 450. Then why cannot citizens sue to restrain the wrongful use of dedicated property under an ordinance that is in conflict with the Constitution of the United States In LeClercy v. Trustees of Gallipolis, 28 Am Dec., p. 641, the court said: "The power of the legislature over property dedicated to public use is not absolute. It may regulate the use of such property, or promote its improvement, but cannot divert or subject it to any use clearly inconsistent with the contract of dedication, and upon such diversion, any person interested would be authorized to institute proceedings to enjoin it." Again, "If land be dedicated for particular public uses, and the dedication is accepted, the authorities are bound to use it for such purposes, and their user of the land for other purposes may be restrained in equity upon the application of owners of other land injured by such user."

Minor on Real Property, sec. 1355.

82[12] "If land is dedicated as a public square, and accepted as such, a law devoting it to other uses is void, because violating the obligation of contracts." Cooley's Constitutional Limitations, page 344, citing Warren v. Lyons City, 22 Iowa, p. 351.

In Rutherford et al. v. Taylor et al., 38 Mo., p. 315, the facts as stated in the syllabus were as follows:

"The County of Randolph had, in the year 1831, received a conveyance of a tract of land for the purpose of laying out a county seat. Upon the land so conveyed the County Court laid out the town of Huntsville, and caused a plat of the town to be filed in the recorder's office, showing the streets and alleys, blocks and lots. Upon one block on the plat was marked 'public lots,' and the property thereon designated had been for many years used as a public square and the courthouse erected thereon. Subsequently the county court ordered part of this property to be sold, which was done, and the purchasers commenced the erection of the buildings. The owners of lots facing the square applied to enjoin the erection of such buildings. Held, 1. That the county, by making and filing the plat of the town and marking this property as 'public lots' had dedicated the land to public uses, and that its acts as proprietor had the same effect as the acts of an individual; 2. That the owners of lots facing the square who had purchased and improved their lots upon the faith of the dedication of the square to public uses, might bring their bill to enjoin the erection of buildings upon the square by individuals." * * *

At page 318, the court said:

"The subject of appropriations for public purpose has been much litigated in this country and frequently under the consideration of the courts; and it may be considered as now the established law of the land, that where lands are dedicated by the owner to any lawful use, whether public, pious or charitable, and are used for the object and in the manner contemplated by the owner, it enures as a grant. Even the existence of a grantee is not essential to the validity of such dedication; nor is any particular form of words necessary to give it effect. If accepted and used by the public in the manner intended, it works an estoppel in pais, precluding the donor and all claiming in his right from asserting any ownership inconsistent with this use. And this principle is applicable to the case of a dedication or appropriation of a lot of ground, to be used as

82[13] an open square, or a public walk, or a landing, or commons."

Citing Trustees of Watertown v. Cowen, 4 Paige, 510; Rector v. Hartt, 8 Mo., 448; City of Hannibal v. Draper, 15 Mo., 634; Brown v. Manning, 6 Ohio, 129; Town of Pawlet v. Clark, 9 Cranch, 292; Cincinnati v. White, 6 Pet., 432; Lane v. Shepherd, 2 Strange, 1004; Jarvis v. Dean, 3 Bing., 447; New Orleans v. U. S., 10 Pet., 662. See also Dillon's Municipal Corporation, section 653; 3 Washburn on Real Property, sec. 1905; and Abbott v. Mills, 3 Vt., 521.

In Taylor v. Commonwealth, 29 Grat., p. 780, the court gave the following instruction:

"That if they believe from the evidence that William Byrd laid off the land comprised within the limits of the town of Manchester

into lots and streets, and made a map of the town so laid off, showing the lots and streets, and that lots were sold by him with reference to such map, all the streets designated on said map were thereby immediately and irrevocably dedicated to the public, and the public have a right to have the streets as designated on said map, throughout their entire length and width, thrown open for ever and kept free from any and all encroachments or obstructions."

Now, it seems settled law that where land is dedicated for a particular purpose and accepted as such, a contract is made and a law devoting it to any other use is void because it violates the obligation of a contract.

The appellants charge in their bill that the alley was a public alley at the time they purchased their property, and the purchases were made in reference to it. We submit, therefore, they had the right to an injunction to prevent a use of the property inconsistent with the use for which it was dedicated, and that the ordinance is void because in conflict with section 10, Article 1, of the Constitution of the United States. We submit further that under the new Constitution of Virginia, without regard to what the old law was on this subject, the appellants had rights in the said alley which they used in connection with their property, and that such rights under the new Constitution gave them an interest sufficient to maintain their bill to test the validity of the ordinance, and to have it declared null and void on the ground that it was unconstitutional.

82[14] Third. We submit the case of Chambers v. Roanoke I. Assn., 111 Va., p. 254, should control this case unless the decision in this case overrules the former. In the case from Roanoke, Chambers' lot did not abut on the section of the street obstructed. We have read the whole record in that case and do not find anything about "peculiar damage to Chambers"; we could not find that he undertok to prove any damage, but he did not consent to closing the street. There was a demurrer to the bill because, "The complainant's bill shows no injury personal or peculiar to said complainant." This court, however, overruled the demurrer and granted the relief prayed for. We think, therefore, that that case should control or be considered as overruled.

For the foregoing reasons, applicants pray that a rehearing of this cause may be granted; that the judgment of this court affirming the decree of the lower court may be set aside and annulled, and the judgment of the lower court reversed.

And petitioners will ever pray, etc.

N. W. BOWE,
ANN CLAY CRENSHAW,
ELLIE W. PUTNEY, AND
CHANNING M. BOLTON,
By COUNSEL.

RICHARD EVELYN BYRD,
DAVID MEADE WHITE,
Attorneys for Petitioners.

82[15] VIRGINIA:

In the Supreme Court of Appeals, Held at the Courthouse Thereof, in the City of Staunton, on Wednesday, the 11th Day of September, 1912.

N. W. BOWE et als., Appellants,
vs.
ELIZABETH S. SCOTT et als., Appellees.

Upon the Petition of the Appellants for a Rehearing of the Decree Entered by This Court in This Cause at Its Place of Session, at Wytheville, on the 13th Day of June, 1912.

The court having maturely considered the petition aforesaid, the same is denied.

A copy, Teste:

A. W. MAY, *Clerk.*

82[16] In the Supreme Court of Appeals of the State of Virginia, at Richmond.

N. W. BOSE et als.
against
FRED. W. SCOTT et als.

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of Virginia at Richmond, do hereby certify that the foregoing printed record contained in seventy-seven pages and one of index, fourteen printed pages of petition to re-hear, copy of opinion and order affirming decree of the Chancery Court of the City of Richmond, and copy of an order of this court refusing the petition to re-hear, is a true and perfect copy of the record of the suit aforesaid remaining in the Clerk's Office of the said Court at Richmond upon which said record the case was heard, tried and determined by the court aforesaid.

In witness and attestation whereof, I hereunto set my hand and affix the seal of said court at Richmond, on this the 2nd day of October, 1912.

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia, at Richmond.

I, James Keith, President and one of the Judges of the Supreme Court of Appeals of Virginia, do hereby certify that the attestation of the above record of Bowe et als., v. Scott, et als., remaining in the Clerk's Office of the said court at Richmond, is in due form and that the foregoing is a true and genuine signature of H. Stewart Jones, Clerk of said court.

Given under my hand and seal this the 2nd day of October, 1912.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

83 *Petition for Writ of Error.*

N. W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, and CHANNING M. BOLTON,

vs.

ELIZABETH S. SCOTT, FRED. W. SCOTT, E. T. D. MYERS, JR., and the CITY OF RICHMOND, a Municipal Corporation.

To the Honorable James Keith, President of the Supreme Court of Appeals of Virginia:

Nathaniel W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton considering themselves aggrieved by the final decision of the Supreme Court of Appeals of Virginia, rendered on the 13th day of June, 1912, in this cause in affirming the decree of the Chancery Court of the City of Richmond, Virginia, hereby pray the allowance of a writ of error from the said decision and final decree to the Supreme Court of the United States, and for a citation and supersedeas. Assignment of errors is hereto attached.

R. E. BYRD,
DAN'L MEADE WHITE,
Counsel for Nathaniel W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton.

84 STATE OF VIRGINIA,
Supreme Court of Appeals, ss:

Let the writ of error issue upon the execution of a bond by the plaintiffs, Nathaniel W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, to the defendants, Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and the City of Richmond, a municipal corporation, in the sum of five hundred dollars; said bond when approved to act as a supersedeas.

Dated September 30, 1912.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

85 N. W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, and CHANNING M. BOLTON,

vs.

ELIZABETH S. SCOTT, FRED W. SCOTT, E. T. D. MYERS, JR., and the CITY OF RICHMOND, a Municipal Corporation.

Assignment of Errors.

Nathaniel W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, plaintiffs in error, now come and file herewith their petition for a writ of error, and say that there are errors in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States they make the following assignments of error.

(I.) The plaintiffs in error charged in their bill of complaint that the ordinance of the City of Richmond, passed on the 9th day of August, 1910, over the veto of the Mayor, was null and void because the ordinance was an attempt to take from the plaintiffs in error, whose property adjoins and abuts upon the said alley, their rights in and to the said alley without due process of law. The validity of the said ordinance was drawn in question by the plaintiffs in error on the ground that it was repugnant to the 14th Amendment to the Constitution of the United States which prohibits a state from depriving any person of his property without due process of law. The decision of the Supreme Court of Appeals of Virginia was against the right claimed by the plaintiffs in error under the Constitution of the United States.

(II.) The plaintiffs in error show in their bill that the por-
86 tion of the alley vacated by the ordinance was dedicated by John C. Shafer who owned the land in fee, as and for a public alley, and that it was accepted by the City of Richmond as and for a public alley, and therefore, the plaintiffs in error charge and aver that the said ordinance is null and void because it is in conflict with section 10, Article 1, of the Constitution of the United States, in that it impairs the obligation of the contract between the said John C. Shafer and the City of Richmond. The validity of the said ordinance of the City of Richmond was denied and drawn in question by the said plaintiffs in error on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof.

(III.) The plaintiffs in error show that two distinct Federal questions were made and relied upon in this cause, to wit, as hereinbefore set out, and that the refusal of the Supreme Court of Appeals of Virginia to consider the several Federal questions relied upon and which controlled in this cause was equivalent to a decision against the Federal right involved therein, and gives the Supreme Court of the United States jurisdiction to review the decree of the said Supreme Court of Appeals of Virginia.

(IV.) Plaintiffs in error further show that the said decree of the Supreme Court of Appeals of Virginia was and is a final decree in the highest court of the State of Virginia in which a decision in said suit could or can be had.

For which errors the plaintiffs in error, Nathaniel W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, pray that the decree of the Supreme Court of Appeals of Virginia, dated on the 13th day of June, 1912, affirming the decree of the Chancery Court of the City of Richmond be reviewed and reversed, and
87 that proper relief be granted to plaintiffs in error, the said Nathaniel W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, and for costs.

R. E. BYRD,
DAN'L MEADE WHITE,
Counsel for Nathaniel W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, the Plaintiffs in Error.

88 Copy.

In the Supreme Court of the United States.

N. W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, and CHANNING M. BOLTON, Plaintiffs in Error,

vs.

ELIZABETH S. SCOTT, FRED W. SCOTT, E. T. D. MYERS, Jr., and THE CITY OF RICHMOND, a Municipal Corporation, Defendants in Error.

Bond.

Know all men by these presents, That we, Nathaniel W. Bowe, as principal, and Bruce Bowe, as surety, are held and firmly bound unto the Commonwealth of Virginia in the sum of five hundred dollars to be paid to Elizabeth S. Scott, Fred. W. Scott, E. T. D. Myers, Jr., and the City of Richmond, a municipal corporation, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 26th day of September, A. D., 1912.

Whereas, the above named plaintiffs in error seek to prosecute their writ of error to the Supreme Court of the United States to reverse the decree rendered in the above entitled cause by the Supreme Court of Appeals of Virginia:

Now, therefore, The condition of this obligation is such that if the above named plaintiffs in error shall prosecute their writ of error to effect, and shall answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

(Signed) N. W. BOWE. [SEAL.]
BRUCE BOWE. [SEAL.]

89 STATE OF VIRGINIA,
City of Richmond, To wit:

I, H. Stewart Jones, clerk of the Supreme Court of Appeals of Virginia, at Richmond, Virginia, do certify that Nathaniel W. Bowe and Bruce Bowe personally appeared before me, in my city aforesaid, on the 30th day of September, A. D., 1912, and acknowledged their signatures to the above bond, and being sworn, stated that each one of them was worth the sum of five hundred dollars after payment of all debts due by each respectively.

Given under my hand this 30" day of September, A. D., 1912.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

The above bond is approved.

JAMES KEITH, *President.*

90 The original of the foregoing writ of error was lodged with the Clerk of the Supreme Court of Appeals of Virginia on the 30th, day of September, 1912, and the following endorsement made thereon: Writ of error filed September 30, 1912.

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia.

91 UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Supreme Court of Appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of Appeals of Virginia before you, at the June term, 1912, thereof, between Nathaniel W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, plaintiffs in error, and Elizabeth S. Scott, Fred. W. Scott, E. T. D. Myers, Jr., and the City of Richmond, a Municipal Corporation, defendants in error, a manifest error has happened to the great damage of the said plaintiffs in error, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 30th day of September, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the District Court of the United States for the Eastern District of Virginia.

92 Allowed.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

[Endorsed:] Writ of error filed Sept. 30/'12. H. S. J.

93 The original of the foregoing supersedeas bond was lodged with the Clerk of the Supreme Court of Appeals of Virginia

on September the 30th, 1912, and the following endorsement made thereon: Bond filed September 30th, 1912.

H. S. J.
H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia.

94 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Elizabeth S. Scott, Fred. W. Scott, E. T. D. Myers, Jr., and The City of Richmond, a municipal corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Appeals of Virginia, wherein N. W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Boulton are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the President of the Supreme Court of Appeals of Virginia, this the second day of October, in the year of our Lord one thousand nine hundred and twelve.

JAMES KEITH, [SEAL.]
President of the Supreme Court of Appeals of Virginia.

Attest:

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia.

Legal service of the above citation is hereby accepted for the City of Richmond this 2d day of October, 1912.

H. R. POLLARD, *City Att'y.*

And for Elizabeth S. Scott & Fred W. Scott,
BRAXTON & EGGLESTON,
Of Counsel.

Legal service accepted for E. T. D. Myers, Jr.
LEAKE & BUFORD,
His Counsel.

October 2nd, 1912.

95 STATE OF VIRGINIA:

Supreme Court of Appeals.

RICHMOND, *October* 3, 1912.

H. Stewart Jones, Clerk, Richmond, Va.

N. W. BOWE et als.
v.
F. W. SCOTT et als.

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Appeals of Virginia, in the City of Richmond, this the 3rd day of October, 1912.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

Endorsed on cover: File No. 23,386. Virginia Supreme Court of Appeals. Term No. 360. Nathaniel W. Bowe, Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, plaintiffs in error, vs. Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and The City of Richmond. Filed October 14th, 1912. File No. 23,386.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 360.

NATHANIEL W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, AND CHANNING M. BOLTON,
PLAINTIFFS IN ERROR.

versus

ELIZABETH S. SCOTT, FRED W. SCOTT, E. T. D. MYERS, JR., AND THE CITY OF RICHMOND, A MUNICIPAL CORPORATION,
DEFENDANTS IN ERROR.

BRIEF OF COUNSEL FOR THE PLAINTIFFS IN ERROR.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 360.

NATHANIEL W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, AND CHANNING M. BOLTON,
PLAINTIFFS IN ERROR.

versus

ELIZABETH S. SCOTT, FRED W. SCOTT, E. T. D. MYERS, JR., AND THE CITY OF RICHMOND, A MUNICIPAL CORPORATION,
DEFENDANTS IN ERROR.

BRIEF OF COUNSEL FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The question is what rights have the plaintiffs in error to an alley in the City of Richmond, and whether they can enjoin the closing of a large part of this alley under the pretended authority of an ordinance of the Council of the City

of Richmond permitting the alley to be closed by two private individuals for their private benefit.

In giving the history of the alley involved in this litigation, we have gone back as far as the year 1852, at which time the land, where the alley in controversy is located, was an old field in Henrico County, west of the western limits of the City of Richmond. The land was then owned by Caroline N. Pollard. On the 31st day of March, 1852, the said Caroline N. Pollard conveyed to John C. Shafer the said land which was described in the deed as a certain tract or parcel of ground lying and being in the County of Henrico, in Buchanan's old field, near the western limits of the City of Richmond, containing four acres.

The land conveyed to said John C. Shafer in 1852 is the same ground that now lies west of Shafer street, between Franklin street and Park avenue, in the said City of Richmond, and extending west from Shafer street a distance of 362 feet. See Exhibit No. 1, on page 56 of the record.

In the year 1867, the boundaries of the City of Richmond were extended west beyond Shafer street, and the land conveyed to the said John C. Shafer in 1852 has been within the corporate limits of the City of Richmond since that time. It appears that John C. Shafer, between the years 1867 and 1875, opened an alley sixteen feet wide through his said land, and that up to the year 1875, the said alley extending west from Shafer street to Harrison street through the land of John C. Shafer was only sixteen feet wide. On the 31st day of May, 1887, the said John C. Shafer lawfully dedicated a strip of his said land, twenty feet wide, as and for a public alley, and the map or plat showing the said alley twenty feet wide was duly recorded with the deed from the said John C, Shafer to Lewis Ginter, dated on the 31st day of May, 1887, and recorded in the clerk's office of the Chancery Court of the City of Richmond. See Exhibit No.

2, on page 37 of the record. The said John C. Shafer made a specific dedication of the strip of land, twenty feet wide, for the particular use as a public alley, and the dedication was good under the statute of Virginia and at common law. And since the 31st day of May, 1887, up to the present time, the alley extending from Shafer street to Harrison street in said City of Richmond, has been a public alley and highway twenty feet wide and used by the public and the plaintiffs in error continuously and uninterruptedly for a period of twenty years and more, to-wit, since the 31st day of May, 1887. The twenty feet of ground dedicated by the said John C. Shafer for the particular use as a public alley was duly accepted by the City of Richmond and the said City of Richmond has exercised jurisdiction over the said public alley since the dedication in the year 1887.

The said alley had been opened and laid out and was a part of the general plan of the particular square bounded by Shafer street on the east, Franklin street on the north, Harrison street on the west, and Park avenue on the south, when the plaintiffs in error acquired their property in the said square, and their respective purchases were made *with regard to the general plan of the said square as it had been laid out*. The real estate owned by the plaintiffs in error in the said square is as follows: Nathaniel W. Bowe owns 917 West Franklin street, Ann Clay Crenshaw owns 919 West Franklin street, Ellie W. Putney owns 921 West Franklin street, and Channing M. Bolton owns 327 North Harrison street. The real estate owned by Nathaniel W. Bowe, Ann Clay Crenshaw, and Ellie W. Putney, in the said square, fronts on the south line of West Franklin street, in the said City of Richmond, ninety-nine feet and four inches, and runs back southwardly between parallel lines a distance of one hundred and fifty feet and abuts on the said alley, which is twenty feet wide. The real estate owned by Channing M.

Bolton, in said square, fronts on the east line of Harrison street and runs back along the said alley a distance of one hundred and fifty feet. Exhibit No. 1, on page 56 of the record, shows the general plan of the said square and the location of the property owned by the plaintiffs in error. The property belonging to Channing M. Bolton is not marked on the said exhibit in his name, but it is the real estate across the alley south of the property owned by the said Nathaniel W. Bowe, Ann Clay Crenshaw, and Ellie W. Putney. It is not shown on the exhibit, but street cars, propelled by electricity, run along Harrison street making ingress and egress from the said alley, in the said square, from Harrison street more dangerous than ingress and egress from Shafer street, where there are no street cars. See record, page 52.

The alley in the said square was paved with granite blocks from Shafer street to Harrison street about twenty years ago at the expense of plaintiffs in error and other property owners whose property abutted upon the said alley in said square. The said alley is a continuation of a public highway running west from Laurel street, in said City of Richmond, out to Lombardy street, in said city. Under an ordinance of the City of Richmond it is unlawful for any person to drive vehicles carrying or designed to carry loads of greater weight than 1,000 pounds along Franklin street and Park avenue, in said city, and the said alley has been used by the public for travel for such wagons and vehicles as are prohibited from traveling on Franklin street and Park avenue.

On the second day of May, 1910, Elizabeth S. Scott and E. T. D. Myers, Jr., presented to the Council of the City of Richmond a petition asking that the said alley and highway for a distance of 130 feet and 11 inches, or so much of the twenty foot alley, in the said square, running from Shafer

to Harrison streets as lies between the front and rear lots owned by the said Elizabeth S. Scott and E. T. D. Myers, Jr., be closed. Exhibit No. 1, on page 56 of the record, shows that portion of the alley in the said square that Elizabeth S. Scott and E. T. D. Myers, Jr., petitioned the council to close. The petitions will be found on page 39 of the record.

On the second day of May, 1910, the said petition was referred by the council to the Committee on Streets, one of the committees of the Council of the City of Richmond, and on the 5th day of July, 1910, the said committee returned to the council the petition together with an ordinance which it recommended for adoption. The ordinance recommended was in the following words:

"AN ORDINANCE.

To Close the Portion of an Alley Extending from Shafer to Harrison Streets, Located Between Franklin Street and Park Avenue.

"Be it ordained by the Council of the City of Richmond:

"1. That upon the petition of Elizabeth S. Scott and E. T. D. Myers, Jr., the portion of the alley now extending from Shafer street to Harrison street, located between Franklin street and Park avenue, commencing at a point one hundred and eighty-five feet six inches from the west line of Shafer street for one hundred and ninety-three feet seven and one-half inches, of which one hundred and fifty-eight feet seven and one-half inches, a part thereof, lying between the lot of the said Elizabeth S. Scott on the south and her lot on the north, and thirty-five feet, the residue thereof, lying between the lot of the said E. T. D. Myers, Jr., on the south and his lot on the north, be, and the same is hereby, closed to the public use and travel; provided, however, that the said abutting property owners, their heirs and assigns shall not erect

construct or maintain any dwelling, stable, shed or house of any kind on the portion of the alley so closed.

"2. That the rights hereby granted shall expire by limitation thirty years from the passage of this ordinance, and the said City of Richmond hereby expressly reserves the right to amend or repeal this ordinance, and to require, at its pleasure, the reopening and establishment as a public alley of the portion of said alley hereby closed, without compensation to said abutting land owners, their heirs or assigns; and at the expiration of the rights hereby granted or in the event said alley is reopened and re-established, abutting land owners, their heirs or assigns, shall have paved said portion of said alley and put the same in proper condition and repair satisfactory to the City Engineer.

"3. That the said Elizabeth S. Scott and E. T. D. Myers, Jr., their heirs, executors, administrators, assigns and subsequent owners of the said abutting property shall indemnify and save harmless the City of Richmond from all damages of whatever nature, arising or claimed by any person to person or property, growing directly or indirectly out of the closing of the said alley, and shall defend at their own costs and charges any suit or suits brought by any person to recover damages growing out of such closing, and to that end the said Elizabeth S. Scott and E. T. D. Myers, Jr., shall execute unto the said City of Richmond a bond in the penalty of Ten Thousand Dollars ($10,000) with surety satisfactory to the City Attorney, conditional that they, their heirs and assigns, will at all times indemnify and save harmless the said City of Richmond against any and all such damages to person or property which may be occasioned by the closing of said alley, as well as all costs and charges growing out of the defence of any suit or suits brought on account of such closing.

"4. Any person violating any of the provisions of this ordinance shall be liable to a fine of not less than twenty-five nor more than one hundred dollars, recoverable before the Police Justice of the City of Richmond, each day's continuance of such violation to be a separate offence.

"5. This ordinance shall be in force from its passage."
See record page 4.

The said ordinance was adopted by the Common Council of the City of Richmond on the 5th day of July, 1910, concurred in by the Board of Aldermen on July 12, 1910, and presented to the Mayor of the City of Richmond on the 15th day of July, 1910. The Mayor did not approve the ordinance, but vetoed the same upon the ground that it was contrary to public policy. See record pages 5 and 40.

On the 1st day of August, 1910, the Common Council of the City of Richmond passed the said ordinance over the veto of the Mayor, and the Board of Aldermen concurred in the action of the said council on the 9th of August, 1910. See record p. 5.

Plaintiffs in error on the 12th day of August, 1910, presented their bill of complaint before the Chancery Court of the City of Richmond, in vacation, praying for an injunction enjoining and restraining the defendants, Elizabeth S. Scott, Fred W. Scott, E. T. D. Myers, Jr., and the City of Richmond, their servants and employees from closing any portion of the public alley, in the said square, between Shafer street and Harrison street, south of Franklin street, and parallel therewith, in said city of Richmond, so as to obstruct the free passage of plaintiffs in error and the public through the said alley, and, on the same day an injunction was awarded in accordance with the prayer of the bill. See record p. 42.

On the 21st day of December, 1910, the defendants in error filed their separate demurrers to the bill with the grounds therefor; and at the same time, the defendants in error, Elizabeth S. Scott and E. T. D. Myers, Jr., moved the court to abate the suit as to the City of Richmond and Fred W. Scott. The several matters raised by the demurrers were

argued before the court on the 21st and 22d days of December, 1910. On the 17th day of February, 1911, the court handed down its opinion in writing sustaining the demurrers. On the 24th day of February, 1911, the plaintiffs in error tendered to the court their amended bill and moved for leave to file the same. On the 6th day of March, 1911, the court pronounced its final decree. The several demurrers were sustained, leave to file the amended bill was refused, the injunction was dissolved and the original bill dismissed with costs. See record p. 55.

The plaintiffs in error appealed from the final decree of the Chancery Court of the City of Richmond, pronounced on the 6th of March, 1911, and on the 15th day of April, 1911, presented their petition to one of the judges of the Supreme Court of Appeals of Virginia, and an appeal was allowed and supersedeas awarded. See record page 29.

On the 13th day of June, 1912, the Supreme Court of Appeals of Virginia handed down its opinion affirming the decree of the lower court. See record p. 58. On September 6, 1912, plaintiffs in error presented to the Supreme Court of Appeals of Virginia an Application for Rehearing, which was denied on the 11th day of September, 1912. See record pp. 61, 71. From the judgment of the Supreme Court of Appeals of Virginia affirming the decree of the Chancery Court of the City of Richmond a writ of error was allowed to this court.

THE QUESTIONS INVOLVED.

The questions involved in this suit are, (1) The validity of the said ordinance of the City of Richmond; and (2) The right of the plaintiffs in error to an injunction to prevent the closing of any portion of the public alley twenty feet wide, in said square, between Shafer and Harrison streets,

in said City of Richmond, so as to prevent the free passage of the plaintiffs in error through the said alley, and to prevent their property, in said square, from being damaged by the closing of any portion of the said alley, in said square.

These questions were raised by the pleadings in the case. It was alleged in the bill of complaint that the ordinance was null and void, and it was shown by complainants that the use of the said alley, to pass and repass to the rear of their premises, was of much value to them, and that they enjoyed the alley in connection with their property, and if the said alley should be closed their rights in the alley would be impaired and their property thereby damaged. See record p. 30.

It was contended by the plaintiffs in error that the said ordinance was void for the following reasons:

(a) That the Council of the City of Richmond had no authority to pass the said ordinance;

(b) That the act of the Council of the City of Richmond in attempting to pass the said ordinance was *ultra vires;*

(c) That the ordinance is an attempt to take from complainants, whose property adjoins and abuts upon the said alley, their rights in and to the said alley without due process of law;

(d) That the ordinance materially impairs the access of plaintiffs in error to their premises, and attempts to give Elizabeth S. Scott and E. T. D. Myers, Jr., public property for their private use and enjoyment and authorizes a public nuisance;

(e) That the said ordinance was contrary to public policy; that it gives a private use of public property and was passed in violation of section 1033 of the Code of Virginia, 1904;

(f) That the title to the ordinance was not broad enough to indicate its purpose and to include paragraphs 2, 3, and 4, of the said ordinance;

(g) That the said ordinance is vague and indefinite and does not state what rights are granted to the said Elizabeth S. Scott and E. T. D. Myers, Jr., in and to the said alley;

(h) That the said ordinance was null and void because it is in conflict with section 10, Article 1, of the Constitution of the United States; that it impairs the obligation of the contract between the said John C. Shafer, who dedicated the said land as and for a public alley, and the City of Richmond, the City of Richmond having accepted the land for the purposes for which it was dedicated. See record page 35.

SPECIFICATION OF ERRORS.

I. The final decree of the Chancery Court of the City of Richmond pronounced on the 6th day of March, 1911, and affirmed by the final judgment and decree of the Supreme Court of Appeals of Virginia on the 13th day of June, 1912, is erroneous because the plaintiffs in error in their bill of complaint charged that the ordinance of the City of Richmond passed on the 9th day of August, 1910, over the veto of the Mayor, was null and void because the said ordinance was an attempt to take from the plaintiffs in error, whose property adjoins and abuts upon the said alley, their rights in and to the said alley without due process of law. The validity of the said ordinance was drawn in question by the said plaintiffs in error and denied upon the ground that the said ordinance was repugnant to the Constitution of Virginia and the Fourteenth Amendment to the Constitution of the United States, which prohibits a State from depriving any person of his property without due process of law. The final decree of the Chancery Court of the City of Richmond

and the final judgment and decree of the Supreme Court of Appeals of Virginia in sustaining demurrer to bill of plaintiff in error were against the right claimed by the plaintiffs in error under the Constitution of the State of Virginia and the Constitution of the United States.

II. The final decree of the Chancery Court of the City of Richmond, pronounced on the 6th day of March, 1911, and affirmed by the final judgment and decree of the Supreme Court of Appeals of Virginia, on the 13th day of June, 1912, is erroneous because the plaintiffs in error charged in their bill of complaint that the portion of the said alley vacated by the said ordinance was lawfully dedicated by John C. Shafer, who owned the land in fee, as and for a public alley, and that the dedication was accepted by the said City of Richmond as and for a public alley, and that, therefore, the said ordinance was null and void because it was in conflict with section 10, Article 1, of the Constitution of the United States, in that it impairs the obligation of the contract between the said John C. Shafer and the City of Richmond. The validity of the said ordinance of the city of Richmond was drawn in question and denied by the said plaintiffs in error in the Chancery Court of the City of Richmond and in the Supreme Court of Appeals of Virginia upon the ground that the said ordinance was repugnant to section 10, Article 1, of the Constitution of the United States and in contravention thereof.

III. The said final decree of the Chancery Court of the City of Richmond pronounced on the 6th day of March, 1911, is erroneous because the said Federal questions made and relied upon in this cause, in the said Chancery Court of the City of Richmond and the Supreme Court of Appeals of Virginia, the last named court being the highest court in the said State to which the said cause could be carried, controlled in this cause, and the final judgment and decree of

the Supreme Court of Appeals of Virginia, affirming the decree of the said lower court, was against the Federal rights involved and relied upon.

ARGUMENT.

The Constitution of Virginia, which was framed in 1869, Article V, section 14, provided that "the General Assembly shall not pass * * * any law whereby private property shall be taken for public uses without just compensation."

"It was uniformly held," said the Virginia Court of Appeals, "under that provision and the statute which carried it into execution, that there could be no recovery for an injury or damage to property, no part of which was actually taken."

Home Building Co. v. *Roanoke*, 91 Va., p. 52;
Myer v. *City of Richmond et al.*, 172 U. S. Rep., p. 82;
Tidewater R. Co. v. *Shartzer*, 107 Va., p. 565.

The construction of the specific provision of the Constitution of 1869 "resulted in much hardship and was a denial of justice in cases where the use, the enjoyment and the value of property were impaired under conditions which were held not to amount to a taking within the meaning of the law. *Tidewater R. Co.* v. *Shartzer*, 107 Va., p. 565.

The injustice done under section 14 of the Constitution of 1869 was so manifest that the matter became a subject of debate in the convention that framed the Constitution of 1902, and care was taken to change the law. The case of *Home Building Company* v. *Roanoke* and the case of *Myer* v. *Richmond* were criticised in the convention. It was argued that the hardships of these cases would not have been possible in Illinois under the provisions of the Constitution of that State, framed in 1870; and that by adopting the

language of the Illinois Constitution of 1870, as construed in *Rigney* v. *Chicago*, 102 Ill., p. 64, and in *Taylor* v. *Chicago*, 125 U. S., p. 161, a new rule of civil conduct would be introduced and additional and greater security given to private property. This line of argument prevailed in the convention and the language of the Illinois Constitution of 1870 was incorporated into the Virginia Constitution of 1902. See Debates Constitutional Convention 1901-1902, volume 1, pp. 687 to 732; Record, pp. 62, 63 and 64; *Swift & Co.* v. *Newport News*, 105 Va., p. 116, and *Tidewater R. Co.* v. *Shartzer*, 107 Va., p. 568.

The Illinois Constitution of 1870 provides that, "private property shall not be taken or damaged for public use without just compensation."

The Virginia Constitution, framed in 1902, Article IV, section 58, provides, "It (the General Assembly) "shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation."

The ordinance complained of is a flagrant attempt on the part of the City of Richmond to deprive the plaintiffs in error of their rights in the said alley without just compensation, and to give to Elizabeth S. Scott and E. T. D. Myers, Jr., the enclosed portion of the said public alley for their own private use and enjoyment for a period of thirty years. Can the plaintiffs in error be deprived of their rights under the new Constitution of 1902 in the manner attempted? We think not.

The case of *Swift & Co.* v. *Newport News*, 105 Va., p. 111, was the first case before the Virginia Court of Appeals involving rights under section 58 of the Constitution of 1902. In that case Swift & Co. brought an action to recover of the said city damages alleged to have been sustained in consequence of a change in the grade of the street. The facts were as follows: The plaintiff owned two lots, with a front-

age of fifty feet, on Twenty-third street, between Washington and Huntington avenues in said city, upon which costly buildings had been erected and were used by the plaintiff in the conduct of a wholesale beef and cold storage business, with a branch depot for the distribution of its beef to purchasers. In this building there was a basement with windows, around which were light shafts which extended into the sidewalk, which basement was used for the operation of an electric motor and other machinery. The building was erected with reference to the then existing grade of Twenty-third street, and in front of same was laid a granolithic sidewalk. The defendant city determined to pave this street entirely at its own expense, and, in order to do so, found it necessary to make a slight change in the grade in front of plaintiff's property, and to raise the surface of the street between four and seven inches. This change of the grade of the street was made, and a contract for paving the street in accordance with the new grade was let prior to the taking effect of the new Constitution of the State at 12 M. July 10, 1902. On these facts a judgment for the plaintiff was affirmed. The court at page 116 said:

"The question as to the effect of a new constitutional provision incorporating the words 'damage' in the Constitution of Illinois was passed upon by the United States Supreme Court in *Chicago* v. *Taylor*, 125 U. S. 166, 31 L. Ed. 638, Sup. Ct. 820, and the opinion says: 'Touching the provision in the Constitution of 1870, the court (State court) said that the framers of that instrument evidently had in view the giving of greater security to private rights by giving relief in cases of hardship not covered by the preceding Constitution, and for that purpose extended the right to compensation to those whose property had been "damaged" for public use; that the introduction of that word, so far from being superfluous or accidental, indicated a deliberate purpose to make a change in the organic law of the State, and

abolish the old test of direct physical injury to the corpus or subject of the property affected. The new rule of civil conduct, introduced by the present Constitution, the court adjudged required compensation in all cases where it appeared "there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property, in excess of that sustained by the public generally."

" 'The conclusion there reached was that, under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using of an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owners of real estate, but if the construction and operation of a railroad or other improvement is the cause of the damage, though consequential, the party may recover.'

" 'Our attention has not been called to, nor are we aware of, any subsequent decision of the State court giving the Constitution of 1870 an interpretation differing from that indicated in *Rigney* v. *Chicago* (102 Ill. 64), and *Chicago &c. R. R. Co.* v. *Ayers* (106 Ill. 511). We concur in that interpretation. The use of the word "damaged" in the clause providing compensation to owners of private property, appropriated to public use, could have been with no other intention than that expressed by the State court. Such a change in the organic law of the State was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former Constitution.' "

In *Tidewater R. Co.* v. *Shartzer*, 107 Va., p. 568, section 58 of the Constitution of 1902, was again passed upon.

"It appears," said the Court of Appeals, "that the language of our Constitution was taken from that of Illinois,

which was adopted in 1870, and had been the subject of judicial construction by the courts of that State and of the United States."

The court cites with approval *Rigney* v. *City of Chicago*, 102 Ill., p. 64; *Chicago* v. *Taylor*, 125 U. S. 161, and *Chicago & W. I. R. Co.* v. *Ayres*, 106 Ill. 511.

At page 567 the court says:

"The words in question should be liberally construed. The provisions of the Constitution requiring compensation to be made for property taken, injured or damaged for public use, are intended for the protection of private rights. They are remedial in character. They should, therefore, be liberally construed in favor of the individual whose property is affected, and the authorities so hold. The language of the Constitution is to be construed liberally so as to carry out and not defect the purpose for which it was adopted.

"Considering the terms of the Constitution and of the statute, as they stood prior to 1902, and recognizing that the changes then introduced were designed to enlarge the right to compensation and extend it to cases where, under the old law, compensation was denied, it would seem that the language employed in the existing Constitution and Code are not difficult of interpretation, and should be held to embrace and give a remedy for every 'physical injury to property, whether by noise, smoke, gases, vibrations or otherwise.'"

The sole question in this case was whether or not the depreciation in market value and consequential damages to property caused by smoke, noise, dust and cinders, arising from the ordinary and lawful operation of a railroad, were the subjects of compensation, under the provisions of the Constitution of 1902. The court held:

"The constitutional inhibition against taking or damaging private property for a public use without making just compensation therefor, and the statute passed in pursuance

thereof, embrace and give a remedy for every physical injury to property, whether by noise, smoke, gases, vibration or otherwise, and every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, causing special pecuniary damage to the owner, for which an action would lie at common law. There need be no physical invasion of the owner's real property, but the owner may recover if the construction and operation of the improvement would amount to a private nuisance at common law, or is the cause of substantial damage, though consequential." See page 562.

In *Virginian R. Co.* v. *London*, 114 Va., p. 334, the court held:

"The owner of a residence is entitled to the comfortable enjoyment of his home, and if his comfort, convenience and enjoyment of it is substantially impaired by the erection of a permanent nuisance near it, he is entitled to recover damages therefor, although the nuisance may have enhanced the market value of his property. The owner of a residence cannot be improved out of his home against his will, by the wrongful act of another."

On page 344 the court said:

"There are nuisances in which the harm attributed consists of damage to realty itself, and, secondly, those in which the damage consists of an inference with some right incident to the ownership or possession of realty."

These cases show that the Court of Appeals of Virginia approved and adopted the construction placed upon the Illinois Constitution of 1870 by the State court in *Pigney* v. *Chicago* and by the Supreme Court in *Chicago* v. *Taylor*. The law of Virginia, like that of Illinois, now requires compensation in all cases where it appears that "there has been some physical disturbance of a right either public or pri-

vate which the plaintiff enjoyed in connection with his property and which gives it an additional value and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the general public." *Chicago* v. *Taylor*, 125 U. S., p. 167.

To determine whether the plaintiffs in error had property rights in the alley in question which could not be taken away from them and given to other individuals by the said ordinance it becomes necessary to examine the facts stated in the bill of complaint.

It was shown (1) that the alley in question was a public alley at the time complainants purchased their property in the square and that they bought with reference to it; (2) that the alley was paved with granite blocks from Harrison to Shafer street by complainants and other property owners abutting upon said alley about twenty years ago at their own expense; (3) that Elizabeth S. Scott and E. T. D. Myers, Jr., will act under the said ordinance, close the alley and use the enclosed portion thereof for their own private use and enjoyment to the exclusion of complainants and prejudicial to their rights; (4) that complainants' property abuts upon the alley and that the alley is the direct way leading from Shafer street to the rear of their property; (5) that complainants have used the said alley to pass and repass from the rear of their premises to Shafer street continuously for a period of more than twenty years; (6) that the use of the said alley to pass and repass from the rear of their premises is of much value to them, and that if the said alley is closed their rights in the same will be impaired and their property damaged; (7) that the alley is of particular benefit and advantage to complainants and to each of them; that their property adjoins the alley, and that it is the direct way from and to the rear of their property for provisions, coal, and such other things as are brought in from the rear

of their premises; (8) that their right of egress and ingress from the rear of their property will be irreparably impaired if the said public alley is closed and they are denied the right of passage through the said way. Record p. 30.

These facts were not denied, but were admitted on the demurrer.

To say that such facts do not constitute a damage to the plaintiffs in error in excess of the damage to persons living in Richmond a mile away is plainly contrary to common sense. The alley in question is in a fashionable part of Richmond, where property is valuable and the destruction of the alley in the particular square will greatly damage the property of the plaintiffs in error by interfering with a right which they are entitled to make use of in connection with their property, the loss or impairment of which will render their property less valuable. That they have the right to use the said alley in connection with their property is settled law; that the destruction of the alley in the square will damage their property is common sense.

Persons purchasing property have the right to claim the benefit of the general plan of the square as it was laid out, and their rights extend to all the streets and alley marked or shown on the plan. The purchaser is entitled to the use of a street as a street, and his rights are not confined to the space immediately in front of the ground bought by him. He is not circumscribed by the narrow limits of the street immediately adjoining his lot. If there are alleys they inure to his benefit. If there are public alleys, he cannot be deprived of the privilege of enjoying them. See *City of Indianapolis* v. *Kingberry*, 101 Ind., p. 212; *Gilbert* v. *Emerson*, 60 Minn., p. 66; *Wolfe et als* v. *Town of Sullivan*, 133 Ind., p. 331; Elliott on Roads and Streets, section 129; *Hodges* v. *Seaboard Roanoke R. Co.*, 88 Va. 662.

In the well considered case of *Lahr* v. *Metropolitan Elevated R. Co.*, 104 N. Y., p. 291, the court said:

"An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises * * * These rights are not only valuable to him * * * but are indispensible to the proper and beneficial enjoyment of his property. * * * He is compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property."

In *Adams* v. *Chicago etc. R. R. Co.*, 39 Minn., p. 286, the court said:

"We think that the doctrine is unqualifiedly established that, no matter how the abutting owner acquires title to his land, and no matter how the street was established, so that the only right of the public is to hold it for public use as a street forever, and no matter who may own the fee, an abutting owner necessarily enjoys, certain advantages, from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises."

In *Iron Works* v. *O. R. & N. Co.*, 26 Oregon, p. 228, the court said:

"Any structure in a street which is subversive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners for which compensation must be made. However difficult it is to trace its origin, or to refer it to any exact legal principle, it is undoubtedly the prevailing doctrine of American Jurisprudence that the owner of a lot abutting on a city street, the fee of which is in the municipality, has, by virtue of proximity, special and

peculiar rights, facilities and franchises in the street, not common to the citizens at large, in the nature of easements therein, constituting property of which he cannot be deprived by the legislature or municipality, or both, without compensation."

See, also, Elliott on Roads and Streets, section 403.

In *Ackeman* v. *True*, 175 N. Y. 353, the plaintiff instituted a suit in chancery to compel the defendant to remove that portion of the building on the lot adjoining the plaintiff, and which building was extended three feet and six inches beyond the easterly line of the street, and to pay damages for the injury sustained by reason of such encroachment and invasion of her rights.

The defendant insisted that inasmuch as the trial court found that the plaintiff sustained no special damages by reason of the alleged encroachment, the complaint was properly dismissed.

But the court said:

"That this encroachment upon the street was a public nuisance and that as to the plaintiff it was a private nuisance, we have no doubt. In the language of Blackstone, a private nuisance is 'anything done to the hurt and annoyance of the lands, tenements or hereditaments of another," which embrace not a mere physical injury to the realty, but an injury to the owner or possessor as respects his dealing with, possessing or enjoying it, and that one erecting or maintaining such a nuisance is liable in an action at the suit of another who has sustained such special damages, and he may be restrained in equity from continuing the nuisance.

"The obstruction of the highway is an act which in law amounts to a public nuisance, and a person who sustains a private and peculiar injury from such an act may maintain an action to abate the nuisance and recover the special damages by him sustained."

See also *City of New York* v. *Rice*, 198 N. Y., p. 125.

In *Tidewater R. Co.* v. *Shartzer*, 107 Va., p. 562, it was held:

"There need be no physical invasion of the owner's real property, but the owner may recover if the construction * * * would amount to a private nuisance at common law, or is the cause of substantial damage, though consequential." See, also, Elliott on Roads and Streets, section 815.

In *Rigney* v. *Chicago*, 102 Ill., p. 70.

"The gravamen of the plaintiff's complaint is," said the court, "that the defendant, in cutting off his communication with Halsted street by way of Kinzie street, has deprived him of a public right which he enjoyed in connection with his premises, and thereby inflicted upon him an injury in excess of that shared by him with the public generally, and it is for this excess he seeks to recover, and nothing more:" *Held*, the city was liable to the plaintiff for damages under the Constitution of 1870.

Chief Justice Dickey, concurring in the opinion of the court, said:

* * * "But it can not be assumed that the purchaser gave his assent to sudden and extraordinary changes in the grade of a public highway, such as it is unreasonable to suppose a purchaser at the time of the original sale, or when he made improvements, would naturally anticipate might be required for the improvement of the public highway. To make such changes is an invasion of the right of the lot owner,—is in excess of a power beyond the right in the nature of an easement spoken of,—and if the value of the property is really and in fact impaired thereby, in such case the injury to the lot owner is, in my judgment, a damage which, under our Constitution, must be compensated."

It cannot be assumed in this case that the plaintiffs in error, at the time of their purchases, had any reason to be-

lieve that the City of Richmond would attempt, by an ordinance, to destroy the alley in the square, in order that it might be used by individuals for their private use. To do so will be an invasion of the rights of the plaintiffs in error under the Constitution of 1902.

In *City of Chicago* v. *Taylor*, 125 U. S. 161, an action was brought by Moses Taylor, as owner of an undivided interest in a lot in Chicago, having sixty feet front on Lumber street, one hundred and fifty feet on Eighteenth street, and three hundred feet on the South Branch of Chicago River, to recover the damages sustained by reason of the construction by that city of a viaduct on Eighteenth street, in the immediate vicinity of said lot. * * * The construction of the viaduct was directed by special ordinance of the city council. On these facts the plaintiff recovered under the Constitution of 1870.

"The new rule of civil conduct," said the court, "introduced by the present Constitution, the court adjudged, required compensation in all cases where it appeared 'there has been some physical disturbance of a right, either public or private, which, which the plaintiff enjoys *in connection with his property, and* which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."

The ordinance of the City of Richmond will not only disturb the rights in the said alley which the plaintiffs in error enjoy in connection with their property, but it takes from them their rights for the private use and enjoyment of others. This is not due process of law.

Missouri Pac. Ry. Co. v. *Nebraska*, 164 U. S., p. 403;

Van Witsen et al. v. *Gutman*, 79 Md., p. 405; Record p. 21;

See, also, Constitution of Virginia, Article II, section 63, clause 18.

The ordinance complained of being a legislative act of the City of Richmond by virtue of a power delegated by the legislature, is to be construed as if it were an act of the legislature, and if unconstitutional it is null and void.

Bacon v. *Texas*, 163 U. S., p. 207;

New Orleans Water Works Co. v. *Louisiana Sugar refining Co.*, 125 U. S., p. 18.

When the Supreme Court of Appeals of Virginia affirmed the decree dismissing the bill of complaint on the demurrers and denied the only remedy which the plaintiffs in error could invoke, the effect of the decree was as to plaintiffs in error to sustain the validity of an ordinance which deprived them of property rights recognized by the Constitution.

In *Chambers* v. *Roanoke I. Ass'n*, 111 Va., p. 254, it was held that plaintiff was entitled to an injunction to enjoin the City of Roanoke from obstructing Pleasant avenue and interfering with his right to the unlimited enjoyment of the use of the entire street or highway.

The plaintiffs in error also rely upon section 10, Article I, of the Constitution of the United States to protect them against the ordinance closing the alley.

It has been pointed out how the alley was opened, and it has been shown that John C. Shafer dedicated the twenty feet of ground on the 31st day of May, 1887, for a public alley, and that it was accepted as such by the City of Richmond. It is contended, therefore, that the ordinance complained of is a legislative act impairing the obligation of the contract of dedication and is void because it is in conflict with section 10, Article I, of the Constitution of the United States.

The dedicated alley formed a part of the general plan of the square, and when plaintiffs in error purchased their lots with reference to the alley, as it then extended from Shafer to Harrison street, the dedication inured to their benefit, and they have the right to enforce the dedication and keep the alley forever open to use, and this right the municipality cannot destroy.

Elliott on Roads and Streets (3d ed.), sec. 132;

Cook v. *City of Burlington*, 30 Iowa, p. 94;

New Orleans v. *United States*, 10 Peters L. Ed., p. 662;

Le Clercy v. *Trustees of Gallipolis*, 28 Am. Dec., p. 641;

Dillon's Municipal Corporation, section 653;

Authorities cited on page 14 of the Record.

In *New Orleans* v. *United States*, 10 Peters, p. 729, the court said:

* * * "That public places, such as roads and streets, cannot be appropriated to private uses, is one of those principles of public law which required not the support of much argument. Nor is there any doubt that if, by stretch of arbitrary power, the preceding government had given away such places to individuals, such grants might be declared void." Even the sovereign cannot grant away the right of the public to a common except under eminent domain, and then compensation must be paid. *Idem*, p. 730.

"If land is dedicated as a public square, and accepted as such, a law devoting it to other uses is void, because violating the obligation of contracts."

Cooley's Constitutional Limitations (7th ed.), p. 344;

Warren v. *Lyons City*, 22 Iowa, 351.

In *Le Clercy* v. *Trustees of Gallipolis*, 28 Am. Dec., p. 641, the court said:

"The power of the legislature over property dedicated to public use is not absolute. It may regulate the use of such property, or promote its improvement, but cannot divert or subject it to any use clearly inconsistent with the contract of dedication, and upon such diversion any person interested would be authorized to institute proceedings to enjoin it."

"If a dedication be made for a specific or defined purpose, neither the legislature, the municipality, nor the general public has any power to use the property for any other purpose than the one designated. This can only be done under the right of eminent domain. Nothing can be clearer than that if a grant is made for a specific, limited, and defined purpose, the subject of the grant cannot be used for another."

"In case all parties interested give their consent, the use for which the property is dedicated may perhaps be changed or destroyed; but inasmuch as there are three parties interested in every dedication—the dedicator and his representatives, the general public, and the property owners with special interest, such as owners of lots abutting on streets, no one of them without the consent of the others can change or destroy the use."

13 Cyc. 498, and authorities.

"Any citizen if likely to be injured in his individual rights with respect to his property by a misuser or diversion of dedicated property may maintain an action to enforce or preserve the use. Persons owning property fronting on or adjacent to a public park or square have such special property interests as entitle them to maintain a suit for the enforcement and preservation of the use of the property as such, and the same is the case with owners of lots abutting on streets."

13 Cyc., p. 501, and authorities.

"If land be dedicated for particular public uses, and the dedication is accepted, the authorities are bound to use it for such purposes, and their user of the land for other purposes may be restrained in equity upon the application of owners of other land injured by such user."

Minor on Real Property, citing Tiffany, Real Prop., sec. 424;
Barclay v. *Howell*, 6 Pet. 498;
Hardy v. *Memphis*, 10 Heisk (Tenn.), p. 127;
See, also, Dillon's Municipal Cor., section 653.

In *St. P. & P. R. R. Co.* v. *Schurmeier*, 7 Wall 272, the court held:

"A municipal corporation takes the title to streets in trust, impliedly if not expressly, designated by the acts of the party in making the dedication. It cannot, nor can the State, appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant, such as the laying of a railroad track."

In *Barclay* v. *Howell's Lessee*, 6 Pet., p. 498, the court said:

"If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery to compel a specific execution of the trust, by restraining the corporation, or by causing the removal of the obstruction."

In *Rutherford et al.* v. *Taylor et al.*, 38 Mo., p. 315, the facts are stated in the syllabus as follows:

"The County of Randolph had, in the year 1831, received a conveyance of a tract of land for the purpose of laying out a county seat. Upon the land so conveyed the County Court laid out the town of Huntsville, and caused a plat of the town to be filed in the recorder's office, showing the streets and alleys, blocks and lots. Upon one block on the plat was marked 'public lots,' and the property thereon designated had been for many years used as a public square and the courthouse erected thereon. Subsequently the County Court ordered part of this property to be sold, which was done, and the purchasers commenced the erection of build-

ings. The owners of lots facing the square applied to enjoin the erection of such buildings. *Held*, (1) That the county, by making and filing the plat of the town and marking this property as 'public lots' had dedicated the land to public uses, and that its acts as proprietor had the same effect as the acts of an individual; (2) That the owners of lots facing the square who had purchased and improved their lots upon the faith of the dedication of the square to public uses, might bring their bill to enjoin the erection of buildings upon the square by individuals."

See, also, *Supervisors* v. *City of Winchester*, 84 Va., p. 467; holding that a square dedicated for one purpose cannot be diverted to another by a municipality. Persons who have acquired rights upon faith of a dedication can restrain misuse. *Norfolk* v. *Nottingham*, 96 Va., p. 34.

The ordinance complained of not only destroys the dedicated alley, but takes away the rights of the plaintiffs in error and deprives them of the use of the alley, in order that Elizabeth S. Scott and E. T. D. Myers, Jr., may have the exclusive and private use of the dedicated property for a period of thirty years. Such an act cannot be justified upon any principle of law.

"* * * But there is no rule or principle known to our system," says Mr. Cooley, "under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment." Cooley on Constitutional Limitations (7th ed.), p. 507.

See also *Richmond* v. *Smith*, 101 Va., p. 161; *Norfolk City* v. *Chamberlayne*, 29 Gratt. 534.

Respectfully submited,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

NO. 360

NATHANIEL W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, AND CHANNING M. BOLTON,

PLAINTIFFS IN ERROR,

VS.

ELIZABETH S. SCOTT, FRED W. SCOTT, E. T. D. MYERS, JR., AND CITY OF RICHMOND,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR DEFENDANTS IN ERROR.

Whittet & Shepperson, Printers, Richmond, Va.

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Sauer v. *New York*, 206 U. S. 536,—36.
Sayward v. *Denny*, 158 U. S. 180,—13.
Shoemaker v. *Randell*, 10 Pet. 391,—17.
Smith v. *Adsit*, 16 Wall. 185; 23 Wall. 368,—20.

State v. *Deer Lodge Co.*, 49 Pac. 147,—38.
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The Myrtle M. Ross, 160 Fed. 19,—23.
The Winnebago, 205 U. S. 354,—28.
Thorne v. *Taw Vale Ry, &c., Co.*, 13 Beav. 10,—30.
Tyler v. *Judges of Court of Registration*, 179 U. S. 405,—28.
United States v. *Illinois Central*, 154 U. S. 225,—29.
Walker v. *Taylor*, 5 How. 64,—18.
Walsh v. *Columbus, &c., R. Co.*, 176 U. S. 469,—27.
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 112,—15, 23, 24.
Wetherill v. *Pennsylvania R. Co.*, 45 Atl. 658,—37.
Williams v. *Eggleston*, 170 U. S. 304,—28.
Winter v. *Montgomery*, 156 U. S. 385,—20.
Wright v. *Columbus, &c., R. Co.*, 50 N. E. 442; 176 U. S. 481,—27.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

NO. 360

NATHANIEL W. BOWE, ANN CLAY CRENSHAW, ELLIE W. PUTNEY, AND CHANNING M. BOLTON,

PLAINTIFFS IN ERROR,

vs.

ELIZABETH S. SCOTT, FRED W. SCOTT, E. T. D. MYERS, JR., AND CITY OF RICHMOND,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

N. W. Bowe and others (plaintiffs in error here) filed, in the Chancery Court of the City of Richmond, Virginia, a bill of complaint against the City of Richmond, Elizabeth S. Scott, Fred W. Scott and E. T. D. Myers, Jr., who are the defendants in error here.

In the said bill of complaint (R. 30 *et seq.*), it was alleged among other things:

(a) That each of the complainants owned real estate, situate in said city, and constituting a portion of the block or square which is bounded by Franklin Street, Shafer Street, Park Avenue, and Harrison Street.

(b) That a *public* alley, twenty feet wide, ran through said block; and the rear end of the lots of the respective complainants abutted on the said public alley.

(c) That the defendants, Elizabeth S. Scott and E. T. D. Myers, Jr., each owned a lot in said square, the said lots being situate between Shafer Street and the land owned by the respective complainants; and that the said public alley bisected the lots of said defendants.

(d) That the said City had passed an ordinance (R. 33), authorizing the said defendants to close *that portion* of said public alley which bisected their said lots.

(e) That the alley in question had been dedicated to the public by one John C. Shafer, and had been accepted by said city and treated as a public alley for more than twenty years.

The bill charged that the ordinance in question was void, for various alleged reasons (R. 35)—among them being "that the ordinance is an attempt to take from your complainants, whose property adjoins and abuts upon the said alley, their rights in and to the said alley without *due process of law*," and that "it is in conflict with section 10, article 1, of the Constitution of the United States; that *it impairs the obligation of the contract* between the said John C. Shafer, who dedicated the land as and for a public alley, [and] the City of Richmond, which alley was accepted by the City of Richmond as an alley for public use."

The bill prayed that the said ordinance be "declared null and void," and that the defendants be enjoined from closing any portion of the said public alley "so as to obstruct the free

passage of your complainants and the public through the said alley."

The defendants filed no answers to the said bill, but separately *demurred* thereto—R. 43, 44, 45, 46, 47.

The demurrers were sustained by the Judge of the Chancery Court (R. 49), *upon the ground* that—

> "Conceding for the moment that the ordinance of the City of Richmond, challenged in the bill, is wholly void, yet this is an attempt made by private individuals to enjoin a public nuisance, where the complainants do not show that they have suffered any special or peculiar damage."

Thereupon, the court entered a final decree (R. 55-6), dismissing the bill of complaint, on demurrer, for the reason above specified.

The plaintiffs in error then presented, to the Supreme Court of Appeals of Virginia, a petition for an appeal from such final decree. In such petition for appeal (R. 1 *et seq.*), the following Assignment of Errors was made (R. 2), viz:

> "(1) The court erred in sustaining the several demurrers to the bill, and dismissing it as to each defendant with costs.
>
> "(2) The court erred in refusing leave to the complainants to amend their bill, and in rejecting the complainants' bill as amended.
>
> "(3) The court erred in dissolving the injunction awarded on the 12th day of August, 1910."

On appeal, the final decree of the Chancery Court was affirmed by the Supreme Court of Appeals of Virginia (R. 60) for reasons stated in its written opinion, which is a part of the record, and is also reported in 113 Va. 499 and 75 S. E. 123.

In the last-mentioned opinion, it is said (R. 58-60):

"The principal question presented by this appeal involves the right of individuals (owning real estate in the city of Richmond, but *whose lots do not abut on the section of the public alley obstructed,* and who have not suffered any peculiar damage therefrom) to have declared null and void a city ordinance, authorizing the closing, for the period of thirty years, of a public alley, reaching from Shafer Street to Harrison Street, to the extent to which it bisects the respective lots of the appellants [appellees] Elizabeth S. Scott and E. T. D. Myers, Jr.; also to injoin the defendants from closing any portion of the alley, or from exercising any rights under 'the void ordinance.'

"From a decree sustaining demurrers to the original bill, overruling the motion of the plaintiffs to file an amended bill, and dissolving the injunction theretofore awarded, and dismissing the bill, this appeal was granted.

"Speaking generally, the obstruction of a public highway is *a public nuisance,* and the trend of authority is, that an individual cannot maintain a bill to enjoin such nuisance unless he can show that he has suffered or will suffer therefrom special and peculiar injury or damage to himself, as distinguished from injury or damage to the general public. Moreover, such special and peculiar injury or damage must be *direct* and not purely *consequential,* and must be different in *kind,* and not merely in *degree,* from that sustained by the community at large.

"The foregoing statement of the rule denotes the line of cleavage between remedies for public nuisances which may be maintained by an individual, and such as must be asserted for or on behalf of the public.

"The rule is thus stated in 29 Cyc. 1210—'It is absolutely essential to the right of an individual to relief against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which all the general public share alike, and the difference between the injury to him and the injury to the general public must be one of kind, and not merely of degree.' 4 Pom. Eq. Jur., sec. 1349; 5 Pom. Eq. Rem., sec. 542, where numerous cases are cited.

"The research of counsel has drawn our attention to decisions which show that the statement of the law as given in Cyc. prevails in England and generally throughout the United States. *It is also the established doctrine in Virginia*"—citing authorities. * * * *

"The learned chancellor, in a clear and conclusive opinion, shows that though the injury to the plaintiffs, as stated in the bill, may be greater than that sustained by other persons living more remote from the scene of the obstruction, such injury is, nevertheless, greater in degree only, and not in kind.

"*Therefore, under the authorities, the bill does not state a case of such special injury as would entitle the plaintiffs to an injunction.* * * * *

"Concurring, as we do, in the ruling of the court sustaining the demurrer to the bill, *it becomes unnecessary, and would, indeed, be improper, to express any opinion with respect to the validity of the ordinance,* or the right of the public to redress the alleged invasion of their prerogative, by prosecution, or other appropriate remedy, for a common nuisance.

"The decree appealed from is without error, and must be affirmed."

Thereupon, the plaintiffs in error filed an application for *rehearing* in the Supreme Court of Appeals of Virginia. In

said application for rehearing (R. 61 *et seq.*), it was urged (R. 62) that plaintiffs in error "have been denied the protection guaranteed by the Constitution of Virginia and *the Fourteenth Amendment to the Constitution of the United States*, which prohibits a State from depriving any person of property without due process of law," and (R. 67) that the ordinance in question was void for the reason last mentioned, and also "because it is in conflict with *section 10, Article 1, of the Constitution of the United States*, in that it impairs the obligation of the contract between the said John C. Shafer and the City of Richmond."

The only action taken by the court, upon this petition for rehearing, was to enter an order (R. 71), setting forth that

> "The court having maturely considered the petition aforesaid, the same is denied."

The case is here upon a writ of error allowed by the President of the Supreme Court of Appeals of Virginia—R. 75.

The Errors assigned in this court are as follows (R. 73), viz:

> "(I.) The plaintiffs in error charged in their bill of complaint that the ordinance of the City of Richmond, passed on the 9th day of August, 1910, over the veto of the Mayor, was null and void because the ordinance was an attempt to take from the plaintiffs in error, whose property adjoins and abuts upon the said alley, their rights in and to the said alley without due process of law. The validity of the said ordinance was drawn in question by the plaintiffs in error on the ground that it was repugnant to the 14th Amendment to the Constitution of the United States, which prohibits a state from depriving any person of his property without due process of law. The decision of the Supreme Court of Appeals of Virginia was against the right claimed by the plaintiffs in error under the Constitution of the United States.

"(II.) The plaintiffs in error show in their bill that the portion of the alley vacated by the ordinance was dedicated by John C. Shafer who owned the land in fee, as and for a public alley, and that it was accepted by the City of Richmond as and for a public alley, and therefore, the plaintiffs in error charge and aver that the said ordinance is null and void because it is in conflict with section 10, Article 1, of the Constitution of the United States, in that it impairs the obligation of the contract between the said John C. Shafer and the City of Richmond. The validity of the said ordinance of the City of Richmond was denied and drawn in question by the said plaintiffs in error on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof.

"(III.) The plaintiffs in error show that two distinct Federal questions were made and relied upon in this cause, to wit, as hereinbefore set out, and that the refusal of the Supreme Court of Appeals of Virginia to consider the several Federal questions relied upon and which controlled in this cause was equivalent to a decision against the Federal right involved therein, and gives the Supreme Court of the United States jurisdiction to review the decree of the said Supreme Court of Appeals of Virginia.

"(IV.) Plaintiffs in error further show that the said decree of the Supreme Court of Appeals of Virginia was and is a final decree in the highest court of the State of Virginia in which a decision in said suit could or can be had."

PART ONE.

THIS COURT WITHOUT JURISDICTION.

It is respectfully submitted that this honorable court is without jurisdiction, and that the writ of error should be dismissed.

I.

No Federal Question Decided

As hereinbefore shown, *no Federal question was decided against plaintiffs in error, or was even considered* by either the Supreme Court of Appeals of Virginia or the Chancery Court of the City of Richmond.

The injunction bill filed by plaintiffs in error was dismissed, on demurrer, by the Chancery Court, upon the ground (R. 49) that—

> "*Conceding for the moment that the ordinance* of the City of Richmond, challenged in the bill, *is wholly void*, yet this is an attempt made by private individuals to enjoin a public nuisance, where the complainants do not show that they have suffered any special or peculiar damage."

And, upon the same ground (R. 58 *et seq.*), the decree was affirmed by the Supreme Court of Appeals of Virginia, whose opinion concludes as follows:

> "Concurring, as we do, in the ruling of the court sustaining the demurrer to the bill, *it becomes unnecessary, and would, indeed, be improper, to express any opinion with respect to the validity of the ordinance*, or the right of the public to redress the alleged invasion of their prerogative, by prosecution, or other appropriate remedy, for a common nuisance."

Sec. 90 Va. Const. of 1902, provides that—

> "When a judgment or decree is reversed or affirmed by the Supreme Court of Appeals, the reasons therefor shall be stated in writing and preserved with the record of the case."

And see the provisions of the final order entered by the Supreme Court of Appeals of Virginia—R. 60.

It is, therefore, submitted that the opinion of the last-mentioned court will be examined in order to determine whether any Federal question was decided.

See Rule 8 of this court;

Sayward vs. *Denny*, 158 U. S. 180, 183-4;

Gross vs. *U. S. Mortgage Co.*, 108 U. S. 477, 484-6;

Phila. Fire Assn. vs. *New York*, 119 U. S. 110, 116;

Jacks vs. *Helena*, 115 U. S. 288.

The Assignment of Errors in this court refers to only two Federal questions (R. 73), viz:

(1) That the ordinance in question is in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States; and

(2) That said ordinance is void, because in conflict with section 10, Article I, of the Constitution of the United States, which prohibits any State law impairing the obligation of contracts.

But, as we have seen, *the State court gave no effect whatever to the ordinance* in question. The State court's *decision was exactly what it would have been if such ordinance had never been passed.*

Sec. 237 of the Judicial Code provides that—

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, * * * where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, *and the decision is in favor of their validity.* * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

See also Sec. 709, Rev. Stat., and the 25th section of the judiciary act of 1789.

In *Missouri & Kansas Interurban Rwy. Co.* vs. *City of Olathe*, 222 U. S. 187, this court said:

> "It thus plainly appears that *the decision did not give effect to the subsequent resolution*, which it is asserted impaired the obligation of the contract, but was placed distinctly upon the ground that, *without regard to that resolution*, or to the question of the right of the company to construct the turn out, the money was payable, as the road bed had been substantially completed. *The judgment would have been the same had the resolution not been adopted at all. No effect whatever has been given to it by the State court*, and this court is without jurisdiction to review its judgment"—citing authorities.

And in *McManus* vs. *O'Sullivan*, 91 U. S. 578, it is held that—

> "This court has no jurisdiction to re-examine the judgment of a State Court, *where a Federal question was not in fact passed upon, and where a decision of it was rendered unnecessary in the view which the court below took of the case.*"

See, also—
San Francisco vs. *Itsell*, 133 U. S. 65;
Bolling vs. *Lersner*, 91 U. S. 594.

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *And where the decision complained of rests on an independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed* by this court without considering any Federal question that may also have been presented. *Eustis* vs. *Bolles*, 150 U. S. 361."

California Powder Works vs. *Davis*, 151 U. S. 389, 393.

Also, *Dower* vs. *Richards*, 151 U. S. 658, 666;

Missouri Pacific Railway vs. *Fitzgerald*, 160 U. S. 556, 576;

Chappell Chemical Co. vs. *Sulphur Mines Co.*, 172 U. S. 465, 471;

Waters-Pierce Oil Co. vs. *Texas*, 212 U. S. 112, 116-117.

"It is a well-settled rule, limiting the jurisdiction of this court in such cases, that 'where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, *or upon some other independent*

ground; and it appears that *the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question*, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one.' *Klinger* vs. *Missouri*, 13 Wall. 257, 263, per Mr. Justice Bradley. And it has been repeatedly decided, under Sec. 709 of the Revised Statutes, that to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but *that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. Brown* vs. *Atwell*, 92 U. S. 327; *Citizens' Bank* vs. *Board of Liquidation*, 98 U. S. 140; *Chouteau* vs. *Gibson*, 111 U. S. 200; *Adams County* vs. *Burlington & Missouri Railroad*, 112 U. S. 123; *Detroit City Railway* vs. *Guthard*, 114 U. S. 133; *New Orleans Water Works Co.* vs. *Louisiana Sugar Refining Co.*, 125 U. S. 18."

De Saussure vs. *Gaillard*, 127 U. S. 216, 233-4.

"Our jurisdiction for the review of a judgment of the highest court of a State depends on the decision by that court of one or more of the questions specified in Sec. 709, Rev. Stat., *and in the way there mentioned.* If there has been no such decision in the suit, there can be no re-examination of the judgment here. It is what was actually decided that we are to consider, *not what might have been decided;* and, as our jurisdiction must appear affirmatively on the face of the record before we can proceed, the record must show, either in express terms or by fair implication, not only the question, but its decision. It is not enough to find by searching after

judgment, that the requisite question might have been raised and presented for decision. It must appear that it was actually raised and actually decided."

Detroit Railway Co. vs. *Guthard,* 114 U. S. 133, 136.

"But to give this court jurisdiction, it is not sufficient to show that the court below might have decided in favor of the validity of these statutes, or either of them; it must be apparent, in the record, that the court did so decide. In the cases of *Crowell* vs. *Randell* and *Shoemaker* vs. *Randell,* 10 Pet. 391, the court went into a review of all the cases which it had previously decided, under the authority of the 25th section of the judiciary act of 1789. In delivering the opinion of the court, Mr. Justice Story says: 'In the interpretation of this section of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction, two things should have occurred, and be apparent in the record; *first,* that some one of the questions, stated in the section, did arise in the court below; and, *secondly,* that a decision was actually made thereon by the same court, in the same manner required by the section. If both of these do not appear in the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a decision might have been made, in the court below. It must be demonstrable that they did exist, and were made."

McKinney vs. *Carroll,* 12 Pet. 66, 70.

"Under this clause of the Act of Congress, *three things must concur,* to give this court jurisdiction. 1. The validity of a statute of a State, or of an authority exercised under a State, must be drawn in question. 2. It must be drawn in question upon the ground that it is repugnant to the Constitution, treaties, or laws of the

United States. 3. The decision of the State court must be *in favor of their validity.*"

Bank of Kentucky vs. *Griffith*, 14 Pet. 56, 58.
Walker vs. *Taylor, et als.*, 5 How. 64, 68.

"But we have not yet considered the most important part of the statute, namely, that which declares that it is only upon the existence of certain questions in the case that this court can entertain jurisdiction at all. Nor is the mere existence of such a question in the case sufficient to give jurisdiction—the question must have been *decided* in the State court. Nor is it sufficient that such a question was raised and was decided. It must have been decided in a certain way, that is, *against* the right set up under the Constitution, laws, treaties, or authority of the United States. * * *

"Finally, we hold the following propositions on this subject, as flowing from the statute as it now stands:

"1. That it is essential to the jurisdiction of this court over the judgment of a State court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State court.

"2. That it must have been *decided* by the State court, or that its decision was necessary to the judgment or decree rendered in the case.

"3. That the decision must have been *against* the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States."

Murdock vs. *City of Memphis*, 20 Wall. 590, 625-6, 635-6.

"The question arises as to what, if any, jurisdiction we have to review the judgment of the State court. Our only right to review it depends upon whether there is a

Federal question in the record, which has been decided *against* the plaintiffs in error. Rev. Stat., Sec. 709. * * * *

"If the judgment of the State court *gives no effect to the subsequent law* of the State, and the State court decides the case *upon grounds independent of that law*, a case is not made for review by this court upon any ground of the impairment of a contract."

Bacon vs. *Texas*, 163 U. S. 207, 216.

"This court does not obtain jurisdiction to review a judgment of a State court because that judgment impairs or fails to give effect to a contract. The State court must give effect to some subsequent statute or State constitution which impairs the obligation of the contract, and the judgment of that court must rest on the statute, either expressly or by necessary implication. * * * The judgment must give effect to some subsequent State statute, or State constitution, or, it may be added, some ordinance of a municipal corporation passed by the authority of the State legislature, which impairs the obligation of a contract, before the constitutional provision regarding the impairment of such contract comes into play."

New Orleans Waterworks Co. vs. *Louisiana*, 185 U. S. 336, 350-1, 352.

See to the same effect—

Lehigh Water Co. vs. *Easton*, 121 U. S. 388.

"This being a writ of error to the highest court of a State, a Federal question must have been decided by that court *against* the plaintiff in error; else this court has no jurisdiction to review the judgment. * * *

"This court, therefore, has no jurisdiction to review a judgment of the highest court of a State, on the ground

that the obligation of a contract has been impaired, *unless some legislative act* of the State *has been upheld* by the judgment sought to be reviewed."

New Orleans Waterworks Co. vs. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 29, 30.

"As we have seen, the bill was dismissed for want of jurisdiction. The judgment of the court respecting the extent of its equitable jurisdiction is, of course, not reviewable here. * * * It may well have been determined that the plaintiff's remedy against Adsit was at law, and not in equity, even if the sale from Holmes to him was utterly void. But whatever may have been the reasons for the decision, whether the court had jurisdiction of the case or not is a question exclusively for the judgment of the State court.

"We need not pursue the subject further. It is enough that it does not appear the claim of the plaintiff, that the sale of Holmes to Adsit was a nullity because of the act of Congress, was necessarily involved in the decision, or that the sale was decided to be valid, or that the decree would not have been made if the invalidity of the sale had been acknowledged."

Smith vs. *Adsit*, 16 Wall. 185, 189-190.

Also, *Smith* vs. *Adsit*, 23 Wall. 368, 373-4.

In *Winter* vs. *Montgomery*, 156 U. S. 385, it appears that plaintiff in error filed, in the chancery court of Montgomery County, Alabama, an orginal and amended bill against the defendant in error. The defendant made no answer to these bills but moved their dismissal on the ground that they were "*without equity.*" This motion was sustained, and decrees rendered by the chancery court dismissing the bills. On appeal to the Supreme Court of Alabama, the decrees were affirmed by the judgment.

Among the errors assigned on the appeal to the Supreme Court of Alabama were the following:

> "3. The court erred in not holding that the ordinance of the city council of Montgomery, as set out as Exhibit C to the original bill, *impaired the obligation of the contract* set out as Exhibit B to the bill.
>
> "4. The court erred in not holding that the acts of the city council, respondent, as set out in said bill, deprived the complainant and Mary E. Winter, the owner of the corpus, of the interest and property described *'without due process of law'*."

This court dismissed the writ of error "on the authority of *Eustis* vs. *Bolles*, 150 U. S. 361, and cases cited."

See, also, *Commercial Bank* vs. *Rochester*, 15 Wall. 639, 642.

II.

Federal Questions Urged Too Late.

Entirely aside from the contention hereinbefore made, it is also respectfully submitted that the Federal questions were urged too late, in the Supreme Court of Appeals of Virginia.

As has been stated, the Assignment of Errors in this honorable court refers to only two Federal questions (R. 73), viz:

> (1) That the ordinance in question is in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States; and
>
> (2) That said ordinance is void, because in conflict with section 10, Article I, of the Constitution of the United States, which prohibits any State law impairing the obligation of contracts.

The original bill of complaint of plaintiffs in error (R. 30 *et seq.*) contains no reference to the *Fourteenth Amendment.* It is true that said bill charges (R. 35) that said ordinance is void, for the reason, among others, that it is "an attempt to take from your complainants, whose property adjoins and abuts upon the said alley, their rights in and to the said alley *without due process of law.*"

This allegation may refer either to the Fifth Amendment to the Constitution of the United States, or to Sec. 11 of the *Virginia Constitution* of 1902 which provides "that no person shall be deprived of his property without due process of law." It is submitted that it will not be construed as referring to the Fourteenth Amendment to the Constitution of the United States.

See *Harding* vs. *Illinois,* 196 U. S. 78;

Miller vs. Cornwall Railroad Co., 168 U. S. 131.

However, the said original bill of complaint does charge (R. 35) "that the said ordinance is null and void because it is in conflict with *section 10, article 1,* of the Constitution of the United States; that it impairs the obligation of the contract between the said John C. Shafer, who dedicated the land as and for a public alley, the City of Richmond, which alley was accepted by the City of Richmond as an alley for public use."

But in the *Assignment of Errors* made in the Supreme Court of Appeals of Virginia (R. 2), no reference whatever is made to *any* constitutional provision. As we have seen, the errors there assigned were as follows:

> "(1) The court erred in sustaining the several demurrers to the bill, and dismissing it as to each defendant, with costs.
>
> "(2) The court erred in refusing leave to the complainants to amend their bill and in rejecting the complainants' bill as amended.
>
> "(3) The court erred in dissolving the injunction awarded on the 12th day of August, 1910."

Sec. 3464, Va. Code of 1904, provides as follows:

> "A petition for an appeal, writ of error, or supersedeas shall *assign errors;* and it shall not be presented until some counsel or attorney of the appellate court shall certify that, in his opinion, it is proper that the decision should be reviewed by such court."

See *American Locomotive Co.* vs. *Hoffman,* 105 Va. at p. 346, and cases there cited.

See, also—

McFarlane vs. *Golling,* 76 Fed. 23, 24;

Florida, &c., R. Co., vs. *Cutting,* 68 Fed. 586;

The Myrtie M. Ross, 160 Fed. 19, 22.

> "It is well settled in this court that a review of the judgment of a State court is confined to the assignments of error made and passed upon in the judgment of the State court brought here for review. The assignment of errors in this court cannot bring into the record any new matter for our consideration. *Harding* vs. *Illinois,* 196 U. S. 78."
>
> *Waters-Pierce Oil Co.* vs. *Texas,* 212 U. S. 112, 115-116.

We desire it understood that the contention now made has reference to the *Assignment of Errors* (R. 2) filed in the State court. And it is proper that we should point out that such Assignment of Errors is incorporated in a petition for appeal, which contains a lengthy argument of numerous questions of law, and that, in such argument (see R. 5-6, 15-16), plaintiffs in error set forth the above-quoted allegations of their bill of complaint, and expressly contended that the ordinance was in conflict with section 10, article 1, of the Constitution of the United States.

It is submitted, however, that the contention we urge should be determined by the contents of the *Assignment of Errors*, and without reference to the numerous questions discussed in the extended note of argument which is also incorporated in the petition for appeal.

> "It should not be necessary to look to the appellant's brief to learn the meaning of his assignment of errors."
>
> *McFarlane* vs. *Golling* (*supra*), 76 Fed. 24.

See, also, *Waters-Pierce Oil Co.* vs. *Texas* (*supra*), 212 U. S. 115-116.

But it is further submitted that, *in no event*, was the *Fourteenth Amendment* to the Constitution of the United States properly brought to the attention of the State court. See remarks, *supra*, as to the language of the bill of complaint.

It is true that, in the *petition for rehearing*, filed in the Supreme Court of Appeals of Virginia, reference was made, both to the Fourteenth Amendment (R. 62, 67), and to section 10, article 1 (R. 67, 70), of the Constitution of the United States. But the only action of the court on that petition was to enter an order, setting forth (R. 71) that—

> "The court having maturely considered the petition aforesaid, the same is denied."

This order does not differ, in substance, from the order entered by the same court in *Forbes* vs. *State Council of Virginia*. See 216 U. S. 396, 398-9. In that case, this court reiterated the well-settled rule that it was too late to raise a Federal question upon a petition for rehearing, unless such question was passed upon in ruling upon the petition; and that such an order as is above quoted fails to show that the Virginia court considered and passed upon Federal questions raised in the petition for a rehearing.

For the reasons aforesaid, we respectfully urge the court to dismiss the writ of error which was allowed in this case.

If, however, the writ of error shall not be dismissed, we respectfully invite attention to the following views concerning the two Federal questions referred to in the Assignment of Errors—R. 73.

PART TWO.

ON THE MERITS.

We pass now to a discussion which involves the merits of the two Federal questions to which the Assignment of Errors relates.

I.

As to the Contention that the Ordinance Impairs the Obligation of a Contract.

The gist of this contention is that no legislative power exists to close or vacate an alley or other highway, if the public easement therein was acquired by *dedication*.

The pertinent facts, as they appear in this record, are as follows:

In 1867, John C. Shafer was the fee-simple owner of certain land, situate between Franklin Street and Park Avenue, and extending Westwardly from Shafer Street *for a distance of 362 feet and 3 inches* (R. 31). "Some time between the years 1867 and 1875," the said John C. Shafer "divided his land by opening a public alley, 16 feet wide, between the northern part and the southern portion of his said land," (R. 31). In 1887, said John C. Shafer "dedicated to the public 4 more feet of his said land"—thus increasing the width of said public alley to 20 feet (R. 31).

The ordinance in question closes that *"portion"* of the public alley, *"commencing at a point 185 feet, 6 inches, from the West line of Shafer Street, for 193 feet, 7½ inches,"* (R. 33).

Miss Arents owns the lot at the corner of Shafer and Franklin Streets (R. 39); and her lot extends Westwardly from Shafer Street, for a distance of 185 feet, 6 inches (R. 33), to the lots of Mrs. Scott and Mr. Myers, the combined width of which last-mentioned lots is 193 feet, 7½ inches (R. 33). These three lots, viz: of Miss Arents, Mrs. Scott and Mr. Myers, extend Westwardly from Shafer Street for a distance of over 379 feet, and, therefore, *include all* of, and more than, the 362 feet, 3 inches (R. 31), *which was owned by John C. Shafer.*

The bill of complaint (R. 30-1) and the several exhibits filed as a part thereof clearly show that the land of *each* of the Plaintiffs in Error is some distance West of any land which was owned by John C. Shafer—that, although *a portion* of the alley in question was dedicated by John C. Shafer, yet *not one of these Plaintiffs in Error claims to be in privity with Shafer, or owns an inch of land that ever belonged to Shafer.*

(1) It, therefore, apears that the Plaintiffs in Error had no rights or interests in the *vacated portion* of the alley, *except such as were possessed by other members of the general public.* They have no "easements or private rights in the alley; *their rights are those of other citizens, and no greater.* No case of dedication, where they have peculiar rights, is made out. They have no greater rights in the alley, at the obstructed part, than proprietors whose lands abut on the alley at Laurel or Lombardy Streets." (Opinion of the Judge of the Chancery Court, R. 51.)

It is confidently submitted that Plaintiffs in Error have no right to be heard upon the contention that the ordinance in question constitutes a breach of a public trust, and impairs the obligation of a contract. *These objections cannot be raised by Plaintiffs in Error.*

"In addition to this, however, the plaintiff stands in no position to take advantage of a default of the State in this particular. *He was not a party to the contract* between the State and the Federal Government; his rights were entirely subsidiary to those of the Government; and, if the latter chose to acquiesce in the abandonment of the canals, as it seems to have done, he has no right to complain. He can only sustain this bill upon the theory that his rights are equal to those of the Government, and that he can call upon the State to maintain the canal for his benefit. * * * The only contract in this case was between the State of Ohio and the United States. *Plaintiff was neither party nor privy to such contract.*"

Walsh vs. *Columbus, &c., R. R. Co.*, 176 U. S. 469, 479-80.

"But what legal right has any one to make investments on the faith of a contract between others, and to which he is not a party or privy, and insist for that reason that the contract shall be observed by either of the parties? We see none."

Wright vs. *Columbus, &c., R. R. Co.* (Ohio), 50 N. E. 442, 448-9; affirmed, 176 U. S. 481.

"We said in *Clark* vs. *Kansas City*, 176 U. S. 114, (quoting from Cooley's Constitutional Limitations, section 196,) that 'a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it.' That is, *a legal interest* in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. 'To this extent only is it necessary to go, in order to secure and protect

the rights of all persons, against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose'."

Lampasas vs. *Bell*, 180 U. S. 276, 283-4.

"Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show *an interest* in the suit *personal to himself*, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens."

Tyler vs. *Judges of Court of Registration*, 179 U. S. 405, 406.

"Unless the party setting up the unconstitutionality of the State law belongs to the class for whose sake the constitutional protection is given, or *the class primarily protected*, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all."

Hatch vs. *Reardon*, 204 U. S. 152, 160.

The Winnebago, 205 U. S. 354, 360.

"If a contract was created by the Arkansas act, when the State accepted its benefits, it is for the United States to complain of the breach, if there be any. The plaintiff is not a party to the contract, and is in no position to invoke its protection."

Hagar vs. *Reclamation District*, 111 U. S. 701, 712.

See, also, *Williams* vs. *Eggleston*, 170 U. S. 304;

O'Phinney vs. *Sheppard, &c., Hospital Trustees* (Md). 42 Atl. 58;

Same vs. Same, 177 U. S. 170.

"The only parties interested in the public use for which the ground was dedicated are the owners of lots *abutting on the ground dedicated,* and the public in general. * * * The only party interested, outside of abutting owners, is the general public, and *the enforcement of any rights which such public may have is vested only in the parties clothed with the execution of such trust, who are in this case the corporate authorities of the city,* as a subordinate agency of the State."

United States vs. *Illinois Central,* 154 U. S. 225, 238-9.

See, also, *Chicago* vs. *Union Bldg. Assn.,* 102 Ill. at pp. 395-399—especially at pp. 398-9, where the court said:

"In no case has it ever been held that a private individual may maintain a bill to enjoin a breach of *public trust* (in the absence of statutory authority) without showing that he will be *specially* injured thereby", citing authorities.

"The general doctrine, according to *Bispham's Principles of Equity* (2nd Ed.), p. 512, is: 'A corporation * * * cannot be compelled to perform a *public duty* at the suit of a private individual, without some *special* right or authority."

In *Manson* vs. *R. Co.* (S. C.), 41 S. E. 832, it was contended "that the city of Columbia held Sidney Park *in trust* for the use thereof, as a public park, by all of its citizens, who thereby had the right, as *cestuis que trustent,* to invoke the aid of the court of equity in behalf of themselves, and other citi-

zens of Columbia, to *enjoin the destruction of a trust* and an interference with its full and free use."

But, as the complainants failed to show any *individual* interest, distinct from that which belongs to every member of the public, the court overruled their contention, in an opinion in which the authorities are quoted from at length.

The opinion in the case last mentioned, was also quoted from, and applied, in *Bancroft* vs. *Bancroft* (Del.), 61 Atl. 689.

> "The authorities, however, without exception, both in England and America, deny to a private person *an injunction for an invasion of the public right* where the bill or complaint fails to show a *special injury* to the complainant."
>
> *Landes* vs. *Walls* (Ind.), 66 N. E. at p. 681—citing a number of authorities.

To the same effect—

Lee vs. *City* (Neb.), 116 N. W. 955;
Davidson vs. *Mayor* (Md.), 53 Atl. at p. 1122;
Bryant vs. *Logan* (W. Va.), 49 S. E. 21;
Mowry vs. *City of Providence* (R. I.), 16 Atl. 511;
Brown vs. *Baldwin*, 112 Va. 536;
Supervisors vs. *Gorrell*, 20 Gratt. 484;
Thorne vs. *Taw Vale Ry., &c., Co.*, 13 Beav. 10.

(2) *The ordinance in question does not impair the obligation of any contract.*

It is confidently submitted that,—unless no legislative power exists to vacate highways in which the public easement was acquired by *dedication*,—the ordinance in question is not in violation of Article I, section 10, of the Constitution of the United States, which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts."

And it cannot be denied that the legislative power exists to relinquish the rights of the public in a street or alley; so that such street or alley—discharged of the public easement—will be the exclusive and private property of the abutting landowner. Certainly there does not rest upon a city the burden of *forever* maintaining, as a public highway, every street and alley which ever, at any time, became a public highway. When the existence of a certain highway has become wholly unnecessary, there must exist the power to relinquish, at one and the same time, the useless easement of the public and the objectionable burden of further maintenance. It is submitted that this power exists to close *any* street or alley, whether the public easement therein was acquired by purchase, by condemnation, *or by dedication.*

> "It is alleged that Union Street was not laid out by any authority of law, *but was dedicated* to the public about the year 1850, by the owners of the Greenwood estate, in connection with the plan of lots sold by said estate. * * * Granting that the part proposed to be vacated was *originally laid out by private parties,* does it necessarily follow that the borough must *forever keep it open,* although it may have become useless, burdensome, and dangerous? The contention of the exceptants is, that neither the court nor the borough authorities possess the power to vacate Union Street, nor any other of the streets in the borough of Pottsville. If this position is correct, then, inasmuch as the Legislature can no longer give relief, Pottsville and other boroughs similarly situated are in a helpless condition."
>
> *In re* Vacation of Union Street (Penn.), 21 Atl. 106, 407.

"The City has the power to vacate streets, and, in the exercise of its power, it can make no difference

whether the *public acquired* the particular *street* by condemnation *or dedication*. In *either* case, it is for the *municipal assembly* to say whether the public interests *require* the *street* to be kept *open*. It is very true that the question whether a certain *use* is public or *private* is a question for the *courts* to determine; *but it is for the assembly to say whether a given street shall be opened or vacated.*"

Glasgow vs. *City of St. Louis* (Mo.), 17 S. W. 743, 745.

See also, *In re* Vacation of Henry Street (Penn.), 16 Atl. 785;

Morris vs. *Philadelphia* (Penn.), 49 Atl. 70;

Kelsoe vs. *Mayor* (Ga.), 48 S. E. 366;

Kinnear Mfg. Co. vs. *Beatty* (Ohio), 62 N. E. 341;

Robbins vs. *White* (Fla.), 42 So. 841;

Knapp, &c., vs. *St. Louis* (Mo.), 56 S. W. 1102, 1105;

City of Columbus vs. *Union Pac. R. Co.* (C. C. A., 8th Cir.), 137 Fed. 869;

Ponischil vs. *Hoquiam, &c., Co.* (Wash.), 83 Pac. 316;

Bellevue vs. *Bellevue Imp. Co.* (Neb.), 90 N. W. 1002.

(3) Attention is also invited to the following point:

The bill of complainant alleges (R. 31) that John C. Shafer dedicated an alley 16 feet wide *"sometime between the years 1867 and 1875"*; and that, in 1887, he dedicated additional land, sufficient to make the alley 20 feet wide.

Now, by an Act of the Virginia Legislature, passed March 18th, 1861 (Va. Acts of 1861, p. 153, 163), the charter of the City of Richmond was amended; and sec. 47 of that statute provided that—

"The council may open, *close* or extend, widen or narrow, lay out and graduate, pave and otherwise im-

prove streets and *public alleys* in the city, and have them properly lighted and kept in good order; *and they shall have over any street or alley in the city, which has been or may be ceded to the city, like authority as over other streets and alleys.*"

A new charter was granted said city by an Act of the Virginia Legislature, approved May 24, 1870 (Va. Acts of 1869-70, p. 120, 123-4); and sec. 19 of that statute provides that—

"19. The city council shall have, subject to the provisions herein contained, the control and management of the fiscal and municipal affairs of the city, and of all property, real and personal, belonging to the said city; and may make such ordinances, orders and by-laws, relating to the same, as it shall deem proper and necessary. They shall likewise have *the power to make such ordinances,* by-laws, orders, and regulations *as they may deem desirable,* to carry out the following powers, which are hereby vested in them:

* * * * * *

"VII. To *close* or extend, widen or narrow, lay out and graduate, pave and otherwise improve, streets and *public alleys* in the city, and have them properly lighted and kept in good order; and they shall have over any street or *alley* in the city which has been or may be *ceded* to the city, like authority as over *other* streets or *alleys.*"

[Quoted in full in *Meyer* vs. *Richmond,* 172 U. S. at p. 90.]

The last-quoted provision was also contained in the charter of the City of Richmond, at the time of the passage of the ordidance in question. Va. Acts of 1908, p. 152, secs. 19 and 19-g.

II.

As to the Contention Based Upon the Fourteenth Amendment to the Constitution of the United States.

It is confidently submitted that this contention is completely disposed of by the opinion of this honorable court in *Meyer* vs. *Richmond*, 172 U. S. 82.

(1) It is true that, since the last-mentioned case was decided, the *Virginia* Constitution has been changed, so as to provide that the Legislature "shall not enact any law whereby private property shall be taken *or damaged* for public uses, without just compensation"—see R. 62.

But the State court has rejected the claims asserted by Plaintiffs in Error; and has dismissed their bill of complaint.

> "This is a writ of error to a State court, so that questions under the *State* constitution and laws cannot be considered as they might be on error to a subordinate court of the United States."
>
> *Missouri* vs. *Dockery*, 191 U. S. 165, 171.

> "In this case, we can only consider whether the fourth section of the ordinance * * * is in conflict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the Constitution of the *State*."
>
> *Barbier* vs. *Connolly*, 113 U. S. 27, 29-30.

> "With the question whether the sum paid was authorized by the Ohio statutes, or constituted a fee, a license, or a tax, under the *Ohio* laws and Constitution, we are not concerned. The writ of error brings before us only the Federal question."

Ashley vs. *Ryan*, 153 U. S. 436, 440.

"But it was adjudged by the Supreme Court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and constitution of that State, constitute a taking, *an injury*, or a destruction *of the plaintiff's property*.

"We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that State, and if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the State court, and we should have to dismiss this writ of error for that reason."

Marchant vs. *Pennsylvania Railroad*, 153 U. S. 380, 385;

Meyer vs. *Richmond*, 172 U. S. 82, 97-8.

(2) The contention of Plaintiffs in Error is that the ordinance in question is in conflict with that clause of the Fourteenth Amendment, which provides that a State shall not "deprive any person of * * * property, without due process of law".

The State court has denied that Plaintiffs in Error had any "property" interest in that portion of the alley which was closed.

"Surely such questions must be for the final determination of the State court. It has authority to declare that the abutting land-owner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been

a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or over-ruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various States to a uniform rule which it shall announce and impose. *Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the Fourteenth Amendment is shown.*"

Sauer vs. *New York*, 206 U. S. 536, 548.

"The plaintiff's constitutional claim is under that provision of the Fourteenth Amendment which prohibits a State from depriving any person of property without due process of law, and he avails himself of it by the contention (which we give in his own language):

" 'That under the constitution and laws of the State of Virginia, the free and uninterrupted use of highways, once dedicated to and accepted by the public, or acquired by the right of eminent domain, are for continuous public use, and that, when relying upon that fact, important public and private property rights have been acquired, the highway cannot be permanently diverted to a private use without proper compensation being made to those injured, and as a consequence, any person or persons so diverting such highway are trespassers and liable in damage to the parties injured.'

"The proposition is very general. To make it available to plaintiff in error it must be held to cover and protect an owner whose property abuts on one part of a street from damage from obstruction placed in another part of the street and not opposite his property—not only a physical taking of his property, but damages to it—not only direct damages, but consequential damages. All of these aspects of the proposition seem to be rejected by the decision of the Supreme Court of Appeals of Virginia on the plaintiff's petition for writ of error. The petition submitted for decision the power of the city of Richmond to make or authorize the obstruction complained of under its charter, and the constitution and laws of Virginia, as well as the prohibition of the Constitution of the United States. If the decision necessarily passed on and denied the latter, as we hold it did, and hence entertain jurisdiction to review its judgment, it necessarily passed on and denied the former. If, under the constitution and laws of Virginia, whatever detriment he suffered was *damnum absque injuria*, he cannot be said to have been deprived of any property. *Marchant* vs. *Pennsylvania Railroad*, 153 U. S. 380."

Meyer vs. *Richmond*, 172 U. S. 82, 94-5.

"But vacating a street *takes no property from anyone*. It merely restores to abutting owners their portion of the land, freed from the servitude of the public way. *There is no constitutional right to damages, even on the ground of injury*, under the present constitution (McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237; *In re* Howard St., 142 Pa. St. 601, 21 Atl. 974)."

Wetherill vs. *Pennsylvania R. Co.* (Pa.), 45 Atl. 658, 660.

"It is not true, in fact or in law, that defendant has *either taken or damaged* plaintiff's property for 'public use.' It has taken no property for public or any other use. That of which complaint is made is vacating certain streets. *In no sense can that act be construed as either taking or damaging private property for public use, as those terms are used in the constitution.*"

East St. Louis vs. *O'Flynn* (Ill.), 10 N. E. 395, 396.
Cherry vs. *Fewell* (S. C.), 26 S. E. 798, 801;
Glasgow vs. *St. Louis* (Mo.), 17 S. W. 743;
Grove vs. *Allen* (Iowa), 61 N. W. 175;
State vs. *Deer Lodge Co.* (Mont.), 49 Pac. 147.

In conclusion, it is respectfully submitted:

1. That this honorable court is without jurisdiction, and should dismiss the writ of error;

2. That, if this honorable court has jurisdiction, the judgment of the State court should be affirmed.

JOHN S. EGGLESTON,
LEGH R. PAGE,
JOHN P. LEARY,
For Defendants in Error.

Richmond, Va., April, 1914.

BOWE *v.* SCOTT.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 360. Argued May 6, 1914.—Decided May 25, 1914.

Where complainants duly asserted Federal rights in opposition to contemplated municipal action, the decision of the court below that they had no right to prevent such action because it was a public wrong which private parties had no right to redress, the Federal right asserted was denied and this court has jurisdiction to review the judgment.

A mere assertion in a state court of a right under the Constitution of the United States, in a petition for rehearing, affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition, considers and passes upon the Federal ground therein relied upon.

A mere allegation in the bill in a suit to enjoin enforcement of an ordinance, that the latter is unconstitutional because impairing the

obligation of a contract between the municipality and a third person not a party to the suit, is not such an assertion of Federal rights as will afford a basis for jurisdiction of this court under § 237, Judicial Code, to review the judgment dismissing the bill.

Where the state constitution contains a due process of law clause, an averment that contemplated action of a municipality would deprive complainant of his property without due process of law, without making reference to the Constitution of the United States or asserting express rights thereunder, is referable to the state constitution alone and affords no basis for invoking the jurisdiction of this court under § 237, Judicial Code.

Writ of error to review 113 Virginia, 499, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, and what constitutes raising the Federal question in the state court, are stated in the opinion.

Mr. Richard Evelyn Byrd and *Mr. David Meade White* for plaintiffs in error.

Mr. Legh R. Page and *Mr. John S. Eggleston*, with whom *Mr. John P. Leary* was on the brief, for defendants in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

To an understanding of this case we outline the situation of the property in controversy:

Shafer owned a tract of land which came to be within the limits of the City of Richmond, bounded on the north by Franklin Street, on the south by Park Avenue, on the east by Shafer and on the west by Harrison Streets. He dedicated to public use by deed in due form which was accepted by the city, a public alley 20 feet wide, crossing from Shafer to Harrison Street at a distance of about 150 feet south of Franklin Street, the alley being therefore between Franklin and Park Avenue. All the plaintiffs but

one owned lots fronting on the south side of Franklin Street running back and abutting on this alley. The exception was Bolton, whose property faced on Harrison Street and was at the corner of that street and the alley. East of the lots fronting on Franklin Street owned by the plaintiffs in error, that is nearer Shafer Street than were such lots, the defendants in error, Scott and Myers, also owned lots on the south side of Franklin Street running back to the alley. They also owned property back of the alley and which extended a considerable distance between parallel lines towards Park Avenue. The City of Richmond passed an ordinance allowing Scott and Myers to close the alley along the line of their property for a period of thirty years upon the condition that they should not build upon it, that the right to keep it closed should be revocable by the city whenever it deemed best and that the city should be held harmless for any damage which might be incurred from closing the alley. As the result of this ordinance the direct movement between Harrison and Shafer Streets by means of the alley was cut off, but as the right to close only extended along the abutting lines of the Scott and Myers property, the alley remained open along the space where the property of the plaintiffs in error abutted and hence did not disturb their direct access to Harrison Street, and also did not deprive of access to Shafer Street as there were other alleys opening into the twenty-foot alley between Harrison Street and the point where the alley was closed by which this result could be accomplished.

The plaintiffs in error then began this suit against the defendants in error to enjoin the enforcement of the ordinance on the ground that as the alley in question had been dedicated to the public by Shafer and had been accepted by the city and treated as a public alley for many years, the city was without power to grant the right to close it and that doing so would wrongfully inflict damage upon

the plaintiffs as the owners of the property abutting on the alley for reasons which were fully stated in the bill and which it is unnecessary here to detail.

The prayer was that the ordinance be declared null and void and for an injunction enjoining the defendants from closing any portion of the said public alley "so as to obstruct the free passage of your complainants and the public through the said alley." Demurrers were sustained by the court of original jurisdiction among others upon the ground that "conceding for the moment that the ordinance of the City of Richmond challenged in the bill is wholly void, yet this is an attempt made by private individuals to enjoin a public nuisance where the complainants do not show that they had suffered any special or peculiar damage." The bill was dismissed.

The Court of Appeals in affirming the case said (113 Virginia, 499, 500):

"Speaking generally, the obstruction of a public highway is a public nuisance, and the trend of authority is that an individual cannot maintain a bill to enjoin such nuisance unless he can show that he has suffered, or will suffer therefrom, special and peculiar injury or damage to himself, as distinguished from injury or damage to the general public. Moreover, such special and peculiar injury or damage must be direct, and not purely consequential, but must be different in kind, and not merely in degree, from that sustained by the community at large."

And, referring to the opinion of the lower court, it was said (p. 501):

"The learned chancellor, in a clear and conclusive opinion, shows that though the injury to the plaintiffs, as stated in the bill, may be greater than that sustained by other persons living more remote from the scene of the obstruction, such injury is, nevertheless, greater in degree only, and not in kind. Therefore, under the authorities, the

bill does not state a case of such special injury as would entitle the plaintiffs to an injunction. . . .

"Concurring, as we do, in the ruling of the court sustaining the demurrer to the bill, it becomes unnecessary, and would, indeed, be improper, to express any opinion with respect to the validity of the ordinance, or the right of the public to redress the alleged invasion of their prerogative by prosecution, or other appropriate remedy, for a common nuisance."

The case is here upon the assumption that we have jurisdiction because Federal rights are involved, which hypothesis is challenged by a motion to dismiss which we at once come to consider.

The grounds of the motion are, first, that as the court below rested its decision upon the want of right of the plaintiff to prevent the closing of the alley because such closing was in any event a public wrong which under the circumstances the complainants had no right to redress, the case below was decided upon a state ground which was independent of any assumed assertion of Federal right, and there is hence no jurisdiction. We do not stop to notice the many authorities which are cited to sustain from many different angles of vision the premise upon which the proposition rests because we think its inapplicability to the case in hand is so obvious that it is unnecessary to do so. This conclusion is evident because upon the assumption that Federal rights were asserted, the contention of the complainants was that they had such an interest in the property or were so peculiarly and especially damaged that they had a right to prevent the closing of the alley which could not be taken from them without depriving them of their Federal rights. This being true, as it undoubtedly is, it follows that the decision of the court below under the hypothesis stated, amounted to a denial of the existence of the Federal rights which were adequately asserted. And from this it follows that the proposition

now relied upon when rightly considered comes to this, that jurisdiction to enforce and protect a Federal right obtains in no case where such Federal right has been denied.

Second. It is further urged that be this as it may there is no jurisdiction because no assertion of rights under the Constitution was made below until the petition for rehearing which was too late and the tardiness of which was not saved by the action of the court since it simply declined to grant the rehearing without deciding the questions presented as the basis of the request for rehearing. As it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view and come to consider whether the record otherwise discloses that a Federal question was so raised below as to support our jurisdiction. The contention that it was, can alone rest upon two paragraphs in the bill as originally filed in the trial court, the one, No. 13, to the following effect:

"Complainants charge and aver that the said ordinance is null and void because it is in conflict with section 10, Article 1, of the Constitution of the United States; that it impairs the obligation of a contract between the said John C. Shafer, who dedicated the land as and for a public alley to the City of Richmond which alley was accepted by the City of Richmond as an alley for public use."

As at best there was no averment in the bill of any contract made with the complainants or any privity between them and Shafer, it cannot possibly be said that this averment amounted to the assertion of the existence in favor of the complainants of a contract protected by the Constitution from impairment. As the one party to the con-

tract, Shafer, was not before the court and was not suing either through himself or by anyone qualified to represent him or having a legal right in his behalf to assert his contract rights, and as the other party to the contract was the City of Richmond, one of the defendants, the entire want of foundation for the assumption that the bill presented a case of impairment of the obligation of a contract within the guarantee of the Constitution of the United States becomes obvious. Besides, we think the conclusion cannot be escaped that when the paragraph in question is considered in the light of the context of the bill, it is conclusively inferable that the averment in the paragraph of an alleged contract between Shafer and the city was not asserted because of the assumed presence of rights under the Constitution in that regard, but solely as a means of stating in another form the want of power in the city to close the alley because as the result of the contract with Shafer it was bound to treat it as a public alley and not close it. And this is reinforced by the fact that no reference to any right under the contract clause is found in the opinion of the trial court, that no suggestion by way of amendment making clear the assertion of a Federal right found expression in an application which was made to amend the bill after the case had been decided, that no assertion of such right was contained in the assignments of error for the purpose of the review by the Court of Appeals although the paragraph in question was referred to in the argument filed to support the assignments as made, and for the further reason that no intimation whatever is contained in the opinion of the Court of Appeals that it deemed that a question under the contract clause of the Constitution arose for decision.

The other passage in the bill is found in subdivision "e" of the tenth paragraph, and is as follows: "That the ordinance is an attempt to take from your complainants whose property adjoins and abuts upon the said alley

their rights in and to said alley without due process of law." But it is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the state constitution, which in this instance has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131, 134; *Harding* v. *Illinois*, 196 U. S. 78.

As from what we have said it results that there is no foundation whatever for the claims of Federal right relied upon as the basis for invoking the jurisdiction of this court since such claims are so wholly unsubstantial and frivolous as to be devoid of any merit, it follows that we have not jurisdiction and the writ of error must be dismissed.

Dismissed for want of jurisdiction.